

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

District of Columbia Circuit

No. 14,601

FILED OCT 3 1958

JAMES H. LEWIS,

Joseph D. Stewart
CLERK

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

123

No. 14,817

JAMES H. LEWIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 14,601

JAMES H. LEWIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 14,617

JAMES H. LEWIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

276

[Received October 3, 1957]

Commissioner's Docket No. 4
Case No. 1967UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)

v.)

1310-9th Street, N. W. Washington,)
D. C. (entire premises) listed to)
LEWIS, James Henry, by city)
directory)AFFIDAVIT FOR SEARCH WARRANTBEFORE James F. Splain, U. S. Court House, Washington 1,
D. C.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) 1310-9th Street, N. W., Washington, D. C. (entire premises) listed to LEWIS, James Henry, By city Directory in the District of Columbia, there is now being concealed certain property, namely lottery tickets, lottery policies, books, papers, memorandum and other device used in setting up, promoting or maintaining a policy lottery. The facts to sustain this are as set forth in the affidavit attached hereto and made a part hereof, which are in violation of the D. C. Code, Title 22, Sections 1501 and 1502.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: See the affidavit attached

hereto and made a part hereof.

/s/ Arville Carter Jr.

Private, Morals Division MPDC

/s/ Houston M. Bigelow

Private, Morals Division MPDC

Sworn to before me, and subscribed in my presence October 1st, 1957.

Filed: 10:20 a.m.

/s/ James F. Splain

jt

United States Commissioner.

277 **AFFIDAVIT RELATIVE TO REQUEST FOR A U.S. COMMISSIONER'S SEARCH WARRANT FOR PREMISES LISTED BELOW AND ARREST WARRANTS FOR THE INDIVIDUALS NAMED OR DESCRIBED HEREIN, FOR VIOLATIONS OF THE LOTTERY LAWS OF THE DISTRICT OF COLUMBIA.**

SEARCH WARRANT:

#1967 1310-9th Street, northwest, Washington, D.C. (entire premises) listed to Lewis, James Henry, by city directory

ARREST WARRANTS:

James Henry Lewis, Colored, male

Forrest McAbee Jr. Colored, male

Premises 1310-9th St. N.W. has been the subject of a number of complaints to the effect that a lottery operation was being conducted at that location by James Henry Lewis, Colored. A number of arrests have been made at these premises for violations of the lottery laws and seizures of numbers slips have been made in connection with these arrest. James Henry Lewis has previously been charged with lottery law violations on six occasions. In early August, 1955, information was received for a reliable source that James Henry Lewis was continuing to conduct a lottery operation from premises 1310-9th St. N.W. and an investigation was conducted, as a results of this investigation; a search warrant was issued for premises 1310-9th St. N.W. and arrest warrants for James H. Lewis and several other persons. A large quantity of numbers paraphernalia was seized from premises 1310-9th St. N.W. and the seven persons arrested were charged with operating Lottery.

On September 3, 1957, information was received from a reliable source that James H. Lewis was continuing to conduct a lottery operation from premises 1310-9th St. N.W. and Pvt. Houston M. Bigelow was

assigned to make an investigation and as this case developed Pvt. Arville Carter Jr. Was assigned to assist Pvt. Bigelow.

AFFIDAVIT:

About 12:15 p.m. Tuesday, September 24, 1957 Pvt. Houston M. Bigelow contacted James H. Lewis and placed the following numbers bet with him; 82 parlayed for \$2.00. James H. Lewis took the \$2.00 MPDC advance funds and told Pvt. Bigelow "Okay". Observation discontinued.

About 12:05 p.m. Wednesday, September 25, 1957 Pvt. Bigelow went to the 1300 Block of 9th St. N.W. and entered a restaurant at 9th and O Sts. N.W. Pvt. Bigelow observed James H. Lewis taking numbers bets from an unidentified colored man, Pvt. Bigelow approached James H. Lewis at the counter and handed him a piece of paper with numbers bets written on it and \$1.00 MPDC advance funds. James H. Lewis said, "I don't want that," James H. Lewis then told Pvt. Bigelow that he didn't know anything about him. Pvt. Bigelow and James Henry Lewis were walking out of the restaurant and Pvt. Bigelow told James H. Lewis, he'd better know something about him if that 82 would have come out yesterday. James H. Lewis told Pvt. Bigelow that he was sorry, he did not remember him. Pvt. Bigelow and James H. Lewis were at the corner of 9th and O Sts. N.W. and Pvt. Bigelow placed the following numbers bets with James H. Lewis; 988-50¢ and 825-50¢. Pvt. Bigelow handed James H. Lewis the above numbers bets written on a piece of paper and \$1.00 MPDC advance funds. Pvt. Bigelow told James H. Lewis, that he would see him later and walked away.

About 12:00 noon Thursday, September 26, 1957 Pvt. Carter observed James H. Lewis walking up and down the 1300 blk. of 9th St. N.W. from 9th and N Sts. N.W. to 9th and O Sts. N.W. Pvt. Carter observed four unidentified colored men and three unidentified colored women approached James H. Lewis in the 1300 Blk of 9th St. N.W. and hand James H. Lewis something and James H. Lewis would put something in his right trouser pocket, write something down and then tear up a piece of paper and throw it on the ground.

About 12:45 p.m. Pvt. Carter observed Pvt. Bigelow contact

James H. Lewis and Pvt. Bigelow placed the following numbers bets with James H. Lewis; 539-25¢, 889-25¢, and 772-25¢. Pvt. Bigelow handed James H. Lewis \$1.00 MPDC advance funds and the above numbers bets
 278 written on a piece of paper and James H. Lewis said, "Okay." and put the numbers and the money in his pocket. About 12:52 p.m. same date Pvt. Carter observed James H. Lewis leave a delicatessen store in the 1300 block of 9th St. N.W. with his pockets bulging and went to premises 1310-9th St. N.W. unlocked the basement door and entered remained about ten minutes and then came out minus the bulge in his pockets and Pvt. Carter observed James H. Lewis from 1:03 p.m. until 2:17 p.m. walking up and down the 1300 block of 9th St. N.W. and thirteen unidentified colored men and six unidentified colored women approached James H. Lewis and handed him something. On some occasions after these unidentified colored men and women, would hand James H. Lewis something he would unfold the piece of paper put something in his pocket, write something down, on a piece of paper and then throw the piece of paper handed to him by these unidentified colored men and women on the ground, and on some occasions these unidentified colored men and women would hand him paper money and he would take a big roll of money out of his trouser pocket and put the other bill around this big roll of money and then write something down. About 2:20 p.m. Pvt. Carter observed an unidentified colored man with bulging pockets and James H. Lewis enter the basement of 1310-9th St. N.W. and this unidentified colored man remained about three minutes and then came out minus the bulge. About 2:22 p.m. Pvt. Carter observed Forrest McAbee Jr. (known to members of the Morals Division as a known numbers man and Forrest McAbee Jr. has been previously been charged with lottery law violation on three occasions) standing in front of 1310-9th St. N.W. and three unidentified colored men handed him something and he then entered the basement of 1310-9th St. N.W. and remained about two minutes then came out and stood in front of the above mentioned premises. Observation discontinued.

About 11:00 Friday, September 27, 1957 Pvt. Bigelow was seated on the steps next door from 1310-9th St. N.W. and observed James H.

Lewis taking money and pieces of paper from several unidentified colored men. About 11:15 a.m. James H. Lewis walked back toward 1310-9th St. N.W. and Pvt. Bigelow approached James H. Lewis and handed him a piece of paper with the following numbers bets written on it; 800-50¢ and 920-50¢ and \$1.00 MPDC advance funds, James H. Lewis took the piece of paper and the \$1.00 then entered the basement of 1310-9th St. N.W. Observation discontinued.

About 12:00 noon Saturday, September 28, 1957 Pvt. Carter observed James H. Lewis until 1:50 p.m. walking up and down the 1300 Blk of 9th St. N.W. and thirty-one unidentified colored men and thirteen unidentified colored women contacted James H. Lewis in the 1300 Blk of 9th St. N.W. and handed him some thing and on some occasions James H. Lewis would unfold the piece of paper put something in his pocket, write something down and then throw the pieces of paper away, and on other times these unidentified colored men and women would hand James H. Lewis paper money and he would take a big roll of money out of his trouser pocket and put the other bill around the big roll of money and then write something down.

About 12:25 p.m. Pvt. Bigelow went to the 1300 Blk of 9th St. N.W. and contacted James H. Lewis, and placed the following numbers bets with him; 894-50¢ and 265-50¢, Pvt. Bigelow paid James H. Lewis \$1.00 MPDC advance funds for the above numbers bets and walked away. Pvt. A. Carter Jr. observed the following cars drive up in front of 1310-9th St. N.W.:

12:50 p.m. same date a yellow Lincoln drove up in front of 1310-9th St. N.W. the driver handed James H. Lewis something, then James H. Lewis wrote something down and tore a piece of paper up.

1:05 p.m. same date a green Plymouth drove up in front of 1310-9th St. N.W. and unidentified colored man seated on the passenger side handed James H. Lewis something.

1:40 p.m. same date a Tan Top Cab drove up in front of 1310-9th St. N.W. and the driver handed James H. Lewis something, and about 1:50 p.m. James H. Lewis entered

1310-9th St. N.W. with an unidentified colored man carrying a brown paper bag, this unidentified colored man remained in premises 1310 9th St. N.W. about five minutes and then came out without the paper bag and walked north on 9th St. N.W. About 1:55 p.m. same date Pvt. A Carter observed Forrest McAbee Jr. standing in front of 1310-9th St. N.W. and he was observed to take something from five unidentified colored men, he then entered 1310-9th St. N.W. From 1:55 p.m. until 2:45 p.m. Pvt. A. Carter Jr. observed seven unidentified colored men enter 1310-9th St. N.W. with their pockets bulging and remained about three to five minutes and then came out without bulging pockets. Observation discontinued.

About 1:35 p.m. Monday, September 30, 1957 Pvt. Bigelow went to the 1300 Blk. of 9th St. N.W. and contacted James H. Lewis and placed the following numbers bets; 325-25¢ and 265-25¢, Pvt. Bigelow handed
 279 James H. Lewis the above numbers bets written on a match cover and 50¢ MPDC advance funds and James H. Lewis, said, "Okay." About 1:38 p.m. Pvt. A. Carter Jr. observed James H. Lewis enter 1310-9th St. N.W. with an unidentified colored man, with bulging pockets and about 1:50 p.m. Pvt. Carter observed an unidentified colored woman enter premises 1310-9th St. N.W. with a bulging black pocket book and James H. Lewis came out of premises 1310-9th St. N.W. about 1:52 p.m. along with this unidentified colored woman and man, minus the bulging pockets and pocket book, about 1:55 p.m. Pvt. Carter observed James H. Lewis and Forrest McAbee Jr. walking down the 1300 blk of 9th St. N.W. and two unidentified colored men and one unidentified colored woman approached James H. Lewis and handed him something, and James H. Lewis wrote something down and put something in his pockets. Observation discontinued 2:00 p.m.

On all occasions where bulging pockets, pocketbooks and brown paper bags are mentioned in this affidavit it is the firm belief of the undersigned officers that they contained numbers slips or other numbers paraphernalia.

From the observation and evidence detailed in this affidavit, it is the firm belief of the undersigned officers that all the aforementioned of described persons are actively engaged in the operation of a policy lottery commonly known as the numbers game and that numbers slips or numbers

paraphernalia is being secreted at premises 1310-9th St. N.W. in violation of the gambling laws of the District of Columbia.

/s/ Arville Carter Jr.

Private, Morals Division MPDC

/s/ Houston M. Bigelow

Private, Morals Division, MPDC

[JURAT, dated October 1, 1957.]

280 . [Received Oct. 3, 1957]

SEARCH WARRANT

To Chief of Police, D. C. or any member of the Metropolitan Police, D. C.

Affidavit having been made before me by Pvt. Arville Carter Jr. and Pvt. Houston M. Bigelow that he has reason to believe that on the premises known as 1310-9th St. N.W. Wash. D. C. (entire premises) listed to James Henry Lewis, by city directory in the District of Columbia there is now being concealed certain property, namely lottery tickets, lottery policies, books, papers, memorandum and other device used in setting up, promoting or maintaining a policy lottery. The facts to sustain this are as set forth in the affidavit attached hereto and made a part hereof.

which are in violation of the D. C. Code, Title 22, Sections 1501 and 1502 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 1st day of October, 1957.

/s/ James F. Splain
U. S. Commissioner

281

RETURN

I received the attached search warrant Oct. 1, 1957, and have executed it as follows:

On Oct. 1, 1957 at 1:50 o'clock P.M., I searched the premises described in the warrant and I left a copy of the warrant with James H. Lewis together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

\$3,367.51 in cash.

1 Astra, 6.35 cal., auto pistol, Ser. #683098

This inventory was made in the presence of James H. Lewis, Houston M. Bigelow and Arville Carter, Jr.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Sgt. William D. Foran

Subscribed and sworn to and returned before me this 2nd day of October, 1957.

/s/ James F. Splain

United States Commissioner

285

[Filed Nov. 14, 1957]

Complaint for Violation of DCC Title 22
Sections 1501 and 1502

COMPLAINT

BEFORE James F. Splain, U. S. Court House, Wash. 1, D.C.

The undersigned complainant being duly sworn states:

That on or about September 24, 1957 at Washington, in the
25, 26, 27, 28 and 30
~~District of Columbia~~, did unlawfully set up and promote a policy lottery
and possess number slips.

And the complainant further states that he believes that.....
are material witnesses in relation to this charge.

/s/ Arville Carter Jr. MPDC

/s/ Houston M. Bigelow

Morals Division

Pvt., Morals Division, MPDC

(JURAT)

286

[Filed Nov. 14, 1957]

WARRANT OF ARREST

To Chief of Police, D. C. or any member of the Metropolitan Police, D. C.

You are hereby commanded to arrest above named person and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with unlawfully setting up and promoting a policy lottery and possessing number slips, in Washington, D. C. on 24th, 25th, 26th, 27th, 28th and 30th of September of 1957. in violation of DCC Title, 22, Section 1501 and 1502.

Date Oct. 1, 1957.

/s/ James F. Splain

United States Commissioner

RETURN

Received Oct. 1, 1957 at Wash., D. C., and executed by arrest of James H. Lewis C/M/58 at 1310 - 9th Street, N. W. on 1:50 PM, Oct. 1, 1957.

/s/ Robert V. Murray

Chief of Police, MPDC

District of Columbia

By /s/ Sgt. William D. Foran

287

[Filed in Open Court Dec. 3, 1957]

Criminal No. 1156 - '57

Grand Jury No. 1371-57

Grand Jury Impanelled October 31, 1957, Sworn in November 5, 1957

* * * * *

The Grand Jury Charges:

Continuously during the period from about September 24, 1957 to about October 1, 1957, within the District of Columbia, James H. Lewis was concerned as owner, agent and clerk and in other ways, in managing, carrying on and promoting a lottery known as the numbers game.

SECOND COUNT:

On or about September 24, 1957, within the District of Columbia, James H. Lewis sold and transferred to Houston Bigelow a chance, right and interest in a lottery known as the numbers game.

THIRD COUNT:

On or about September 27, 1957, within the District of Columbia, James H. Lewis sold and transferred to Houston Bigelow a chance, right and interest in a lottery known as the numbers game.

FOURTH COUNT:

On or about October 1, 1957, within the District of Columbia, James H. Lewis sold and transferred to Houston Bigelow a chance, right and interest in a lottery known as the numbers game.

FIFTH COUNT:

On or about October 1, 1957, within the District of Columbia, James H. Lewis had in his possession and under his control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers
288 and writings, current and not current, used and to be used in a lottery known as the numbers game.

SIXTH COUNT:

Continuously during the period from about September 24, 1957 to about October 1, 1957, within the District of Columbia, James H. Lewis was engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411.

/s/ Oliver Gasch

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Franklin M. Aaronson
Foreman

289 [Filed Dec. 6, 1957] Charge Vio. D.C. LOTTERY LAWS
PLEA OF DEFENDANT

On this 6th day of December, 1957, the defendant JAMES H. LEWIS, appearing in proper person and by his attorney C. P. MITCHELL, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

By direction of
BOLITHA J. LAWS

293 [Filed April 14, 1958]

MOTION TO DISMISS

Comes now the defendant, James H. Lewis, by and through his attorney, Curtis P. Mitchell, and moves this Honorable Court to dismiss all counts subsequent to Count One of the indictment and for cause therefor states as follows:

1. That the counts subsequent to count one of the indictment are included therein and that the indictment is therefor duplicitous.

2. And for such other and further reasons to be called to the attention of the Court upon the hearing of this motion.

/s/ Curtis P. Mitchell
Attorney for Defendant

[Certificate of Service]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Filed July 19, 1958]

1

Washington, D. C.

Monday, April 21, 1958.

The above-entitled matter came on for hearing before the HONORABLE HENRY A. SCHWEINHAUT, at 10:30 o'clock a.m., Monday, April 21, 1958.

APPEARANCES:

On behalf of the government:

VICTOR CAPUTY, ESQ.

On behalf of the defendant:

CURTIS P. MITCHELL, ESQ.

EDWARD MALENOF, ESQ.

14 MR. MITCHELL: Does your Honor want to consider one other matter? The motion has not been passed on.

THE COURT: The statements and documents --

MR. MITCHELL: This motion to dismiss.

THE COURT: Motion to what?

MR. MITCHELL: Both motions. I am particularly interested in the motion to dismiss.

THE COURT: I had filed on April 14th, a motion to inspect documents. Has that been passed on?

MR. MITCHELL: No, sir.

THE COURT: I haven't seen these things you filed.

MR. MITCHELL: I filed it after I had heard from one of the officers that there was some contention about something being seized. After he told me that, that is when I filed a motion.

THE COURT: What motion?

MR. MITCHELL: A motion to dismiss. So there won't be any misunderstanding as to the position, Judge Morris and Judge Tamm and Judge Laws have all taken the position that motion should be heard at trial.

15 THE COURT: Motion to dismiss?

MR. MITCHELL: Yes. The only reason I call it to your attention now is predicated on his opening statement as to what evidence he is going to adduce. Your Honor will recall Count 1 charges the defendant, from September 24th to and including October 1st, with operating a lottery. Now, Count 2 charges that he sold a chance on the 24th. Count 3, that he sold a chance on the 27th. All those counts with respect to that, relate to the same as Count 1.

My position is, in regard to that, that the prosecution cannot have his cake and eat it too. This indictment is duplicated as to Counts 2, 3, 4, and 5, the same thing as you charge him with under Count 1.

THE COURT: I am certain on that point. I deny your motion on that point. Do you have any others?

MR. MITCHELL: No.

THE COURT: I can't see that at all.

MR. MITCHELL: You have got to say he has committed several offenses, and he hasn't.

THE COURT: Every time he makes a sale, he commits an offense.

MR. MITCHELL: Doesn't the term "operating" mean a continuing situation? If they prove Count 1, they have proved Counts 2, 3, 4 and 5.

16 THE COURT: That still doesn't indicate the duplicity. Suppose the jury doesn't believe that he operated a lottery, but that he did sell, as described in Count 2. They can convict him in Count 2 and not on one. If they find him guilty on Count 1, they can find him guilty on 2, 3, 4 and 5.

MR. CAPUTY: I just last week appeared before Judge Matthews. She didn't take your position.

MR. MITCHELL: Judge Tamm took the position, but it is something that should be done at the trial. He said in Court that it is something that should be done in trial, as it depends on the same evidence. If this depends on the Supreme Court cases, you cannot do it.

THE COURT: Isn't the answer to that that the second, third and fourth counts, the sale, represents a sentence merging into the first one?

MR. MITCHELL: Not for the purposes of the prosecution, if they rely on the same evidence.

THE COURT: You have to convince me with an authority because I am against you right now. I thought it had been passed on, contrary to your position.

MR. MITCHELL: In the Agnew Case, the Court of Appeals said the reason they didn't give an opinion on that proposition was because it wasn't taken up in the court below.

THE COURT: If that is your position, it is premature to raise it now. It has to be done after the evidence is in.

17

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HOUSTON BIGELOW,

Police Officer, was called as a witness on behalf of the government, and after having been first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

18 Q. State your name and occupation. A. Houston Bigelow, Private, assigned to the Metropolitan Police Department.

Q. Any particular branch of the Metropolitan Police Department?

A. Yes, sir, the Morals Division.

Q. In the Morals Division, any unit in the Morals Division?

A. Yes, sir, liquor and gambling.

Q. Were you assigned to the gambling squad of the Metropolitan Police Department from the period September 24th to October 1, 1957?

A. I was.

Q. Now, in your capacity as a member of the gambling squad of the Metropolitan Police Department, were you assigned the investigation of the alleged numbers activities at 1310-9th Street, N. W., in the District of Columbia? A. Yes, sir.

Q. As a result of that assignment, what, if anything, did you do?

A. I went to the 1300 block of 9th Street, N. W., and I played numbers with an unidentified man at that time.

Q. When did you first go to that area? A. On September 24th.

Q. On September 24th, will you tell the Court and Jury what you did, if anything? A. On September 24th, about 12:00 noon, I was engaged in a conversation with an unidentified colored man at the corner of 9th and O Streets, N. W. He stated to me --

Q. Don't tell us what he said. What did you do after that? A. I took him to the 1300 block of 9th Street, N. W. where I met an unidentified colored man called Paul Dock, and I placed with him a numbers bet.

Q. What numbers bet? A. 82 parlay for \$2.00.

Q. Where did that take place? A. At the 1300 block of 9th Street.

Q. Do you see that person in the Courtroom, the person with whom you placed that bet? A. Yes, sir, I do.

Q. Point him out. A. The fellow in the middle of the table.

THE COURT: What suit does he have on?

THE WITNESS: A blue suit.

THE COURT: In the middle of the counsel, at the table, is the defendant, and you knew him as Dock at that time?

THE WITNESS: Yes, sir.

BY MR. CAPUTY:

20 Q. Do you know who he is today? A. Yes, sir. His name is James Henry Lewis.

Q. Did you discontinue then your observation of the individual on September 24th? A. After placing the numbers bet, I discontinued.

Q. Tell us when, if any time you saw that individual again? When was the next day? A. I saw him on September 25th.

Q. Where and what time? A. Around twelve noon, I observed Doc to enter a lunch room at 9th and O Streets, N. W.

THE COURT: What date is this?

THE WITNESS: September 25th.

THE COURT: The next day?

THE WITNESS: Yes, sir.

BY MR. CAPUTY:

Q. At what time? A. Around twelve noon, I entered the lunch room, right after he did. I said something to him. Apparently he didn't hear me. He kept going in the lunch room. In the lunch room, I watched him seat himself at the counter and take money and pieces of paper from two unidentified men at the bar.

I walked over to him and asked him to take my numbers bets, and he stated to me that he didn't want them. He didn't know me. As he was leaving the place, I told him if the 82 Parley I played the previous
21 day came out, he better call me because I wanted my money. He said he was sorry. I placed numbers bets with him.

Q. What numbers bets did you play with him? A. 988 at 50¢ and 825 at 50¢.

Q. Did there come a time when you saw him again after September 25th? A. Yes, sir. I saw him on September 26th.

Q. Where? A. On the 1300 block of 9th Street, N. W.

Q. About what time? A. Right around noon.

Q. Did you have any contact with him? A. Yes, I contacted him and again placed numbers bets with him.

Q. Tell us what. A. I would like to refer to my notes and refresh my memory about the numbers I placed with him.

THE COURT: He tells us now that on the 24th, the 25th, he made a numbers bet. He said the first was a parlay and the second, he gave two numbers. He hasn't said how much he bet, and described the transaction in any way to it. He simply says by concluding, more or less, by describing it, that he made numbers bets.

MR. CAPUTY: There might be an error.

22 THE COURT: If you don't do it now, you have to do it later.

BY MR. CAPUTY:

Q. On the 24th, the number you played, 82, was for how much?

A. \$2.00.

THE COURT: He said it was a parlay. I know what a parlay is. Maybe some of the jurors don't.

BY MR. CAPUTY:

Q. Do you know what a parlay is? A. The first two digits of three number digits.

THE COURT: You aren't going to prove it. What is a parlay?

THE WITNESS: A parlay is the first two numbers of a three number digit.

THE COURT: That doesn't tell us anything. That can be explained later, too. The next day?

BY MR. CAPUTY:

Q. The 25th. A. 988 at 50¢; 825 at 50¢.

Q. Had you written those numbers and the money on a piece of paper? A. Yes, sir.

Q. How did you write them? A. Written down in ink.

23 Q. I mean how were the numbers on the piece of paper? A. Well, 988 -- 50¢; 825 -- 50¢. Gave him one dollar.

Q. On the 26th, what was the number? A. I have permission to refer to my notes?

MR. MITCHELL: May I ask that his recollection be exhausted first?

THE COURT: He asked me first if he couldn't. You mean you aren't sure without referring to your notes there as to how much was paid and what number?

THE WITNESS: Yes, there was four different numbers that day.

THE COURT: You aren't certain about what they were?

THE WITNESS: Yes, sir.

THE COURT: You are certain with whom you played them?

THE WITNESS: Yes, Defendant Lewis.

THE COURT: Yes, now refer to your notes.

THE WITNESS: The numbers I played that day were 938 - 25¢; 920 - 25¢; 772 - 25¢ and 889 - 25¢.

BY MR. CAPUTY:

Q. Did you see him any other day after September 26, 1957?

A. Yes, sir. I saw him on the 27th.

Q. Where? A. In the 1300 block of 9th Street, N. W.

Q. What time? A. It was around 11:45 when I saw him.

24 Q. Did you have any contact when you saw him on that day?

A. Yes, sir, I did.

Q. Tell us about it. A. I was talking to two fellows in the 1300 block of 9th Street, N. W., and Defendant Lewis came by where we were standing, and I contacted him and placed numbers bets with him.

THE COURT: Who?

THE WITNESS: Defendant Lewis.

BY MR. CAPUTY:

Q. This is on September 27th? A. Yes, sir.

Q. What numbers did you play and for how much? A. I would like to look at my notes.

Q. Your memory is exhausted? Your recollection is exhausted?

A. Yes, sir. My memory has been restored. The numbers I placed with him that day were 800 - 50¢ and 920 - 50¢.

Q. What time was it? A. This was 11:45.

Q. Can you tell us where, if anywhere, the defendant had gone after you placed these? A. Why he looked at the piece of paper I gave
25 him. Then he went over to the basement of the premises 1310-9th Street, N. W.

Q. Did you see the defendant Lewis again after September 27, 1957?
A. Yes, sir. I saw him again on the 28th of September.

Q. Where and what time? A. I saw him in the 1300 block of 9th Street around noon.

Q. Tell us about that? A. Well, on that particular day, September 28th, I was seated on some steps there in the 1300 block of 9th Street. The defendant Lewis came by where I was sitting, and I beckoned him to come over, and he did. I placed some numbers bets with him.

Q. What bets? A. My memory is exhausted to the bets.

THE COURT: All right. Go ahead. Refer to your notes.

THE WITNESS: My memory is restored. The numbers I placed were: 844 - 25¢, 265 - 25¢, and I gave the defendant Lewis a one dollar bill, and he gave me fifty cents. He left the area.

BY MR. CAPUTY:

Q. He left the area? A. Yes, sir.

26 Q. Did you see him any other day after that day? A. Yes, sir. I saw him on the 30th of October.

Q. What month? A. On the 30th of September.

Q. Where and what time? A. In the 1300 block of 9th Street, N. W.

Q. Tell us about that. A. I had written two numbers on a match book cover, and I contacted the defendant Lewis and gave him the following numbers for fifty cents: 325 - 25¢ and 265 - 25¢. He accepted the money and the numbers.

Q. Did you discontinue your observation? A. I did.

Q. Did you see him any other day after September 30, 1957?
A. Yes, sir. I saw him again on October 1, 1957.

Q. What time? A. It was around noon.

Q. Did you make any plays? A. Yes, sir, I did.

Q. Where and what time? You say around noon, where? A. The 1300 block of 9th Street, N. W.

Q. What numbers did you place? A. My memory is exhausted as to the exact numbers and amounts.

27 THE COURT: When was this?

THE WITNESS: October 1st.

THE COURT: All right.

THE WITNESS: On October 1st, the numbers I played with the Defendant Lewis was 325 - 50¢ and 265 - 50¢ and on 82 parlay, and the \$2.00 I paid him for the numbers bets, the serial numbers had been recorded earlier in the morning in the Morals Office, Metropolitan Police Department, and those were the bills I used.

BY MR. CAPUTY:

Q. Those were recorded in your presence? A. Yes, sir.

Q. Recorded by whom? A. Recorded by Sergeant Foran.

MR. CAPUTY: This envelope and the contents thereof, may it be marked Government's Exhibit No. 1 for identification?

(The envelope above referred to was marked Government's Exhibit No. 1 for identification.)

BY MR. CAPUTY:

Q. I show you what has been marked Government's Exhibit No. 1 for identification, which is a brown envelope containing a paper and two one-dollar bills. Will you examine it and tell us whether you can identify it? A. Yes, sir. These are the two one-dollar bills I used, along with

28 my signature on the record.

Q. Used with whom? A. Defendant Lewis.

THE COURT: Well, your answer isn't quite clear.

BY MR. CAPUTY:

Q. Can you identify Government's Exhibit No. 1 and the contents thereof? A. Yes, sir.

Q. How do you identify them? A. By comparing the serial numbers with the record that was made of them with my signature, in my presence.

Q. After having made these plays with the defendant, can you tell us whether you secured a search warrant and an arrest warrant? A. Yes, sir.

Q. A search warrant of what premises? A. Of 1310-9th Street, N. W.

Q. Did you have an arrest warrant for the defendant? A. Yes, sir.

Q. Were you present at the time the search warrant was executed?
A. Yes, sir.

Q. Do you know who executed the search warrant? A. Yes, sir.
It was Sergeant Foran and Corporal Kissner.

* * * *

57

ORVILLE CARTER

was called as a witness on behalf of the Government, and after having been first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name and assignment? A. Private Orville Carter, Jr., assigned to the Morals Division, Gambling and Liquor Squad.

Q. How long have you been assigned to the Gambling Squad of the Metropolitan Police Department for the District of Columbia? A. Four years.

Q. Are you a member of that squad now? A. Yes, sir.

58 Q. Did you assist Private Bigelow in the investigation of alleged gambling activities at 1310-9th Street, N. W., in the District of Columbia?
A. I did.

Q. Did you do anything about that, sir? A. I did.

Q. Did there come a time when you were in the 1300 block of 9th Street, N. W. ? A. Yes, sir.

Q. When was the first day that you concerned yourself with the investigation of gambling activities at 1310-9th Street, N. W. ? A. The first day I concerned myself with the activities of the 1300 block of 9th Street was September 26, 1957.

Q. What time of day? A. About twelve noon.

Q. Will you tell the Court and Jury what, if anything, you did, and what, if anything, you observed? A. About twelve noon, September 26th, I observed four unidentified colored men.

* * * *

AFTERNOON SESSION

(1:40 o'clock p. m.)

MR. MITCHELL: May we approach the Bench?

THE COURT: Yes.

(At the bench:)

MR. MITCHELL: Your Honor, the reason I asked to approach the bench was that I observed in the last bit of testimony that this man was giving before your Honor recessed for lunch, that he was stating that he had seen a number of people going into these premises. I think in all fairness in this case that that testimony should not be permitted, because there isn't a bit of evidence anywhere which is available, or which is available to me and which I have knowledge of, and knowing Mr. Caputy as I do, sir, that this was in a gambling premises. The only purpose to be served by this officer's testimony that he saw somebody going into this house is to merely prejudice this man.

MR. CAPUTY: He hadn't finished his answer - with bulging pockets. He had seen the various people, and that is all part of the observation which would be necessary for the issuance of that search warrant.

THE COURT: I won't stop you there.

MR. MITCHELL: Then, I would ask you to do this, because as I called your Honor's attention to this morning, so far as this search of this place is concerned, I would reply on what the return is, and I am
61 going to object, and I would like an opportunity to go into it and out of the presence of the jury.

THE COURT: Do you want to put the testimony in first? That would be wiser.

MR. CAPUTY: Out of the presence of the jury?

THE COURT: I gave him the basis of his objection, so if I do so, the jury will not have heard evidence. I will do that. Might as well start now.

Members of the Jury, there was some evidence from this witness that I must take out of your presence in order to determine what if any of it was admissible. Therefore, I will have to ask you to retire and remember not to discuss the case.

(The Jury retires to the Jury Room)

THE COURT: All right.

Thereupon

ORVILLE CARTER

was recalled as a witness, and testified as follows:

DIRECT EXAMINATION - Resumed.

BY MR. CAPUTY:

Q. Let me ask you this question, Private Carter. Do you today know one named James H. Lewis? A. Yes, sir, I do.

Q. Do you see him here? A. Yes, sir, I do.

62 Q. Point him out. A. He is sitting between counsel, Mr. Mitchell and the other lawyer.

THE COURT: Mr. Malenof. That is the defendant?

THE WITNESS: Yes.

BY MR. CAPUTY:

Q. When you were assigned to assist in the investigation of alleged gambling activities at 1310-9th Street, N. W. in the District of Columbia, did you have occasion during that investigation to see the Defendant Lewis? A. Yes, sir, I did.

Q. Will you tell the Court the first time that you saw the Defendant Lewis in connection with this investigation? A. The first time I saw Defendant Lewis was on September 26, 1957.

Q. In your own words, tell us what if anything you saw about him and about the premises, 1310-9th Street, N. W. ?

THE COURT: Fix the place and time, at the beginning, and then go on from there.

BY MR. CAPUTY:

Q. Where was it that you first saw the Defendant Lewis on your first day? A. About twelve noon , I saw Defendant Lewis walk up and down the 1300 block of 9th Street.

Q. Did you observe anything else? A. I observed four unidentified
63 fied colored men and three unidentified women contact Mr. Lewis.

THE COURT: On the street?

THE WITNESS: Yes.

THE COURT: On the sidewalk?

THE WITNESS: Yes, sir, and they would hand him something.

THE COURT: All seven of them, together?

THE WITNESS: At different times.

THE COURT: What did they do?

THE WITNESS: They would hand him something. He would write something down, put something in his pocket and tear up a piece of paper. Then he would do something.

THE COURT: Then what did he do?

THE WITNESS: Tossed it on the ground.

BY MR. CAPUTY:

Q. Did you see anything else on September 26th? A. Yes, sir.

Q. Will you tell us whether you saw Private Bigelow on that day?

A. I did.

Q. Tell us about that? A. About 12:45, the same day, I observed Private Bigelow contact Defendant Lewis in the 1300 block of 9th Street, N. W.

64 It was near 9th and O. It was more near 9th and O than 9th and M Street.

Q. Did you observe anything between them? A. No, sir, I did not.

Q. Was anything passed between them? A. I didn't observe it.

Q. Did you observe anything else on this day? A. Yes, sir.

Q. Tell us about it. A. About 12:52, I observed something else.

I will have to refer to my notes. My memory is exhausted.

THE COURT: Go ahead. What day?

THE WITNESS: The same day, 12:52 p. m., September 26th, 1957. I observed Defendant Lewis leave the delicatessen in the 1300 block of 9th Street, N. W., with bulging pockets and walked to 1310-9th Street where he walked down in the basement, unlocked the door with a key, which he had on a long chain, and entered.

BY MR. CAPUTY:

Q. Did you see him leave? A. Yes, sir, I did.

Q. How soon after? A. About ten minutes later, he left without the bulge to his pockets. He stood outside, in front of his house.

Q. By that what do you mean? In front of his house, where?

65 A. On the sidewalk.

Q. What street? A. Yes, sir.

THE COURT: 9th Street?

THE WITNESS: 9th Street, yes, sir. I observed Defendant Lewis and I observed 13 unidentified men and 6 unidentified colored women contact Defendant Lewis in the 1300 block of 9th Street, and they would hand him something, and he would write something down, and he would tear up pieces of paper and throw them on the ground.

THE COURT: What did he do with the paper on which he wrote something down? What did he do with that?

THE WITNESS: He would take that piece of paper and put it in his shirt pocket.

THE COURT: He took away something else, a different piece of paper?

THE WITNESS: Yes.

THE COURT: Threw it away?

THE WITNESS: Yes, sir.

THE COURT: Was the same thing done each time he received something. He put that in his pocket, wrote something down, and then what did he do with the paper he wrote something on?

THE WITNESS: He would put it in his left shirt pocket.

66 THE COURT: Then another piece of paper he would throw away?

THE WITNESS: Yes, sir.

BY MR. CAPUTY:

Q. Which paper was it that he would throw away? A. I believe it is the paper.

THE COURT: Based on your observation, can you tell us today?

THE WITNESS: Based on my observation, that piece of paper that these unidentified colored men and women would give to him.

THE COURT: What did he do with that?

THE WITNESS: Take it; write something down, and throw it away.

BY MR. CAPUTY:

Q. Did you observe anything else on that day? A. I would also like to say --

MR. MITCHELL: Objection.

BY MR. CAPUTY:

Q. That you observed? A. That I observed Defendant Lewis receive dollar bills, and he would take a roll of money out of his pocket and put the dollar bills around the roll, and put the money in his pocket.

THE COURT: Where would he get the dollar bills?

67 THE WITNESS: From these unidentified colored men and women.

THE COURT: On the same occasion?

THE WITNESS: On the same occasion.

THE COURT: Were you close enough to see they were dollar bills, rather than two or five or ten?

THE WITNESS: I wasn't close enough to see whether they were dollar bills or five dollar bills.

THE COURT: They were bills?

THE WITNESS: Yes, sir.

THE COURT: Were you close enough to see that they were United States currency, money?

THE WITNESS: All I could see was by the color. It was money.

THE COURT: Was it green?

THE WITNESS: Yes, sir.

THE COURT: Was this green paper which you thought was money, different from the paper that he would receive from them?

THE WITNESS: Yes, sir, it was.

THE COURT: Still different from the paper he wrote on and put in his pocket?

THE WITNESS: Yes, sir, it was.

THE COURT: Where were you standing with respect to where he was?

68 THE WITNESS: I was standing across the street, in a vacant radio shop.

THE COURT: Inside of a building?

THE WITNESS: Yes, sir.

THE COURT: Inside the radio shop, 1317?

THE WITNESS: Yes, sir, I believe so.

BY MR. CAPUTY:

Q. Can you tell us whether on September 24th you had seen any people go in 1310-9th Street, N.W. ? A. September 24th?

Q. 26th. A. Yes, sir, I did.

Q. Who did you see? A. I observed an unidentified colored man at 1310-9th Street, with the Defendant Lewis.

Q. Did you observe anything about that unidentified colored man?
A. This unidentified colored man had a bulging pocket.

Q. Did you see him leave? A. Yes, sir, I did.

Q. How long had he been in there? A. About three to five minutes.

Q. Did he come out before Defendant Lewis? They went in together, you say? A. Yes, sir.

69 Q. Did they come out together? A. Yes, sir, they did.

Q. Were you in a position to observe the appearance of this unidentified colored man when he came out? A. I was, sir.

Q. Tell us about that. A. The bulge in the unidentified colored man's pocket wasn't bulging when he came out.

Q. Did you observe --

THE COURT: You mean there was no bulge?

THE WITNESS: Yes. There wasn't any bulge.

BY MR. CAPUTY:

Q. When was the next time, if any, that you saw the Defendant Lewis? A. September 28, 1957.

Q. Did you see him on the 27th? A. No, sir.

Q. Whereabouts on the 28th did you see him?

THE COURT: The 28th?

MR. CAPUTY: The 28th.

THE WITNESS: I will have to refer to my notes.

THE COURT: Go ahead.

THE WITNESS: I observed Defendant Lewis walking up and down the 1300 block of 9th Street, N. W.

70 BY MR. CAPUTY:

Q. About what time? A. About twelve noon.

Q. Tell us about it. A. I observed 31 unidentified colored men and 13 unidentified colored women contact Defendant Lewis in the 1300 block of 9th Street, N. W., and they would hand him something, and he would write something down, tear the piece of paper up that these unidentified people would give him, and put the other piece in his shirt pocket, and sometimes, he would put dollar bills around other money he had in his pocket.

THE COURT: Again, you don't know that they were dollar bills or not?

THE WITNESS: No, sir. I will just say bills.

BY MR. CAPUTY:

Q. Did you continue your observation that day, or when was it continued? A. I continued my observation.

Q. Will you tell us what if anything you saw, if anything?

THE COURT: That is 31 men and women, 13 women, you said? That is 31 men and 13 women?

THE WITNESS: Yes, sir.

71 THE COURT: You say they contacted Lewis? Did they do that separately or did they all come together?

THE WITNESS: They did it separately.

THE COURT: During what period of time that day?

THE WITNESS: From 12 noon to 12:50.

THE COURT: After that?

BY MR. CAPUTY:

Q. You stated you continued your observation. What if anything else did you see? A. About 12:50, I observed a yellow Lincoln drive up in front of 1310-9th Street, and the driver of that car handed Lewis something about 1:05.

THE COURT: Could you see what it was that the man handed Lewis?

THE WITNESS: No, sir, I couldn't.

THE COURT: Was it paper, cloth, metal, or give us any description at all. Did you just see one arm pass to another arm?

THE WITNESS: That is correct.

THE COURT: Then what?

THE WITNESS: Defendant Lewis put something in his pockets.

THE COURT: In whose pocket?

THE WITNESS: His own pocket, and walked back to the sidewalk.

BY MR. CAPUTY:

72 Q. Did you observe anything else? A. About 1:05, I observed a green Plymouth drive up to 1310-9th Street, and the man on the passenger side handed Lewis something. He put it in his pocket and walked back to the sidewalk.

Q. How long did that take? A. About three minutes.

Q. Did you observe anything else? A. About 1:40, a tan-top cab drove up in front of 1310-9th Street, and handed Lewis something, and he put it in his pocket and walked back to the sidewalk. About 1:50 p.m., Defendant Lewis and an unidentified colored man entered the basement of premises 1310-9th Street.

Q. Was there anything about that unidentified colored man that went into the basement with Defendant Lewis? A. This unidentified colored man entered the premises 1310 with bulging pockets. He remained about ten minutes, and he came out minus the bulge in his pockets.

Q. Did you observe anything else? A. That is all, sir.

Q. This that you observed, this unidentified colored man, entered the basement with bulging pockets or a bag?

MR. MITCHELL: He said, "Bulging pockets." I object to anything else.

THE COURT: What is your question?

73 MR. CAPUTY: Was it bulging pockets or a paper bag that you observed the individual going into the premises with?

THE COURT: On the 28th?

MR. CAPUTY: Yes.

THE COURT: He has already said it was a bulging pocket. Did you see anything else but a bulging pocket?

THE WITNESS: I didn't see this in my notes.

THE COURT: You said you didn't see something in your notes?

THE WITNESS: Yes, sir. My notes show there was a brown paper bag.

THE COURT: What about a brown paper bag?

THE WITNESS: This unidentified colored man was carrying when he entered 1310-9th Street.

THE COURT: Was it in his pocket, or did he put it in his pocket?

THE WITNESS: Had it in his hand.

THE COURT: Then it wasn't a bulging pocket on the 28th?

THE WITNESS: No, sir.

THE COURT: How about Lewis, did he have bulging pockets on the 28th?

THE WITNESS: I don't have Lewis with bulging pockets at that particular time.

BY MR. CAPUTY:

74 Q. Did you make any other observations of the Defendant Lewis on any other day? A. I did.

Q. What day? A. September 30, 1957.

Q. What time and where? A. About 1:38 p.m., I observed Defendant Lewis enter 1310-9th Street with bulging pockets. About 1:50 p.m. an unidentified colored man entered 1310-9th Street, N.W. with bulging pockets. An unidentified colored woman entered 1310-9th Street with bulging black pocketbook.

Q. How long did she stay? A. She remained there about three to five minutes.

Q. Did you see her come out? A. Yes, sir.

Q. Did you observe anything about that pocketbook after she came out? A. The black pocketbook was minus the bulge when she came out.

THE COURT: Flat, you mean?

THE WITNESS: No, not flat. It wasn't as noticeable as when she entered.

BY MR. CAPUTY:

Q. Did you observe anyone else enter the premises? A. Yes, sir. About 1:52 p. m., I observed Defendant Lewis come out of 1310-9th
75 Street with this unidentified woman.

Q. Woman or man? A. Woman, carrying the black pocketbook, and about 1:55, I observed Defendant Lewis walking up and down the 1300 block of 9th Street, N. W., and two colored men and one colored woman approached Defendant Lewis and handed him something. Defendant Lewis wrote something down and put something in his pockets, and tore up the other piece of paper and threw it on the ground.

Q. Did you make any other observations of the Defendant Lewis after the 30th of September? A. The only observation was during the raid.

THE COURT: Still want to object?

MR. MITCHELL: To the evidence, yes, sir.

THE COURT: You want to examine him first out of the presence of the jury?

MR. MITCHELL: No, just in your Honor's presence.

CROSS EXAMINATION

BY MR. MITCHELL:

Q. In all these occasions that you say you saw somebody with bulging pockets, you never did see what they had, did you? A. What they had in their pockets, do you mean?

Q. Yes. A. No.

76 Q. In some cases, you stated you saw the Defendant Lewis tear up some pieces of paper and throw them into the street. Did you pick those pieces of paper up? A. No, sir.

Q. You don't know what was on them? A. No, sir.

Q. As far as the premises, 1310-9th Street, prior to October 1st, that is between the dates you have indicated here, the 26th of September and October 1st, had you been inside 1310? A. No, sir, I hadn't.

Q. You didn't have any knowledge of what was in there, did you?

A. What was in there?

Q. Yes, what was in 1310. A. I don't understand the question.

Q. Do you know what was in 1310? Did you ever see anything that was in there? A. No, sir, I haven't.

Q. With respect to the automobile. I think your Honor asked the question -- just for the record -- these people you saw in the automobile, you didn't know them, did you? A. No, sir.

Q. Whatever it was that they had or what they said, or what they had done, you didn't know about that either, did you? A. No.

77 Q. You didn't overhear any conversation between these people and the Defendant Lewis, did you? A. No.

Q. With respect to this lady that you saw, who had a bulging pocketbook, have you seen women with bulging pocketbooks before?

A. Had I see any?

Q. Yes. A. You mean with relation to numbers?

Q. Do you know that she had numbers in there? A. No, sir.

Q. You didn't see in there? A. No, sir.

Q. Are you married? A. Yes, sir.

Q. Does your wife carry a pocketbook? A. Yes, sir.

Q. Carries a lot of junk in there? A. I imagine so.

Q. Did you sign the affidavit for the search warrant with Officer Bigelow? A. I did, sir.

THE COURT: Do you want to be heard?

78 MR. MITCHELL: Very frankly, this is fantastic. To go into a person's dwelling house, you have to have something more than suspicion. Admittedly, this man does not know in any instance what this man had in his pocket, or somebody else had. On two occasions, he saw somebody go to this man's house. Surely the defendant has a right to go into his own house, and furthermore, or moreover, he doesn't even know what he had in his pocket.

I submit to your Honor, I am not going to make this an extended argument. If you look at this affidavit, your Honor, I would have filed a

motion a long time ago if there were any matter about a seizure. The only thing I knew about was money and a gun, both of which have been returned.

It seems to me that where you have a situation of this character-- would you indulge me for one moment? I think perhaps, your Honor, in order to cover one point, it would be necessary to put the defendant on the stand.

THE COURT: With respect to the admissibility of this witness' testimony?

MR. MITCHELL: Yes, but not only to the admissibility of his testimony, but what I had in mind is not only the testimony, if your Honor please, but also anything they say they got as a result of the search warrant. If the warrant were issued without proximate cause, certainly they cannot use something they seized in the premises.

79 THE COURT: We have the testimony of Officer Bigelow that around 9th and O, in the 1300 of 9th Street, he made these bets with the defendant. You have the testimony of this officer of what he observed. At about the same time on three other days, Bigelow testified in the same block he made bets with the same defendant. It seems to me that the two added up, equal a proximate cause.

MR. MITCHELL: To search his house? Maybe to get an arrest warrant for him, but not to search his house.

THE COURT: There hasn't been anything introduced coming from the house.

MR. MITCHELL: I think we have to face the situation.

THE COURT: Are you planning to produce anything that was found in the house?

MR. CAPUTY: Just on his person in the house.

THE COURT: That is a different thing.

MR. CAPUTY: Nothing from the house, just on his person. What was got has been returned.

THE COURT: There was an arrest warrant and a search warrant. I am not concerned with the search warrant, of its validity or absence

of validity until the produce of its use is offered in evidence, but now Mr. Caputy says he isn't going to offer it.

MR. MITCHELL: They claim they got money and the piece of paper Mr. Caputy showed me, they got it from the house.

80 THE COURT: They got it from his person. They had a warrant to arrest him, and a right to go into the house to get it.

MR. MITCHELL: I wonder if he did. If your Honor please, you will recall the McKnight House. I had the officer on the stand. He admitted, freely admitted that not only he but this officer and another officer had adequate opportunity to arrest him; that this man was out there for over an hour. They knew this man had a warrant and had an opportunity to arrest him, which opportunity they didn't take advantage of. You know what the purpose was. The purpose was to get into that house.

MR. CAPUTY: They didn't have to arrest him on the outside, on the basis of that warrant. They had a search warrant. If it were only a search warrant, but they had a valid search warrant.

MR. MITCHELL: If your Honor rules this search warrant is valid, you see my point?

THE COURT: That is the point he is making, that the search warrant wasn't valid. They didn't have a right.

MR. CAPUTY: There was enough proximate cause to issue that search warrant.

THE COURT: I am certain in my mind when you take the testimony of Bigelow, with the testimony of this officer, and with it the pattern of the numbers operations, which is what your witness observed
81 fitted what Bigelow did, and what this witness says he saw fitted the pattern of the numbers operation.

MR. MITCHELL: I don't agree with you at all. You can't go that far. There is nothing that has been introduced so far that makes the house a part and parcel of the operation.

THE COURT: Except Carter saw Lewis going into the house with his pockets bulging. Having got whatever he got out on the sidewalk, from time to time during these hours that he told us about, he having received something from a number of people, whatever he received

went into his pocket. Then he went into that one three times, the 26th, the 28th and the 30th.

MR. CAPUTY: And saw other people go in.

THE COURT: And saw a woman.

MR. CAPUTY: A colored man.

THE COURT: A colored man go into the house, not somewhere else, but into that house. I think that is a proximate cause for the issuance of that search warrant, and I will treat what you have been saying as an oral motion. You haven't filed a written one in advance.

MR. MITCHELL: No.

THE COURT: As an oral motion to suppress anything as a result of the search warrant, and if you wish, for the record, an oral motion, to order an oral motion directed against the search warrant --

82 MR. MITCHELL: And also against his testimony.

THE COURT: -- against testimony that comes as a result of it.

MR. MITCHELL: Because it only lends itself to conjecture or speculation, there is nothing defined therein.

THE COURT: I think there is enough to establish proximate cause, so I deny the motion.

MR. MITCHELL: Your Honor, this stuff about bulging pockets is a myth.

THE COURT: I don't think so.

MR. MITCHELL: I think I try about as many of these cases as anybody else.

THE COURT: Of course a pocketbook could bulge with all kinds of gadgets.

MR. MITCHELL: It is too tenuous a thing to come in here and say they had bulging pockets.

MR. CAPUTY: I think our Court of Appeals has accepted that it is.

THE COURT: We have the proverbial paper bag in here. We didn't have that a few minutes ago. We have it now. I deny the motion, and I will hear the witnesses' testimony. Come up to the Bench.

AT THE BENCH:

MR. MITCHELL: Something just occurred to me. When he testified with respect to Lewis, and he said that about a bulging pocket, 83 I thought he said -- your Honor, when you first asked him, "What did he do," he said he put it up in his shirt pocket. Whatever could be carried in a shirt pocket?

THE COURT: He wrote something down and put it in his shirt pocket.

MR. MITCHELL: That is supposed to cause the bulge?

THE COURT: Here is what I thought he meant. I thought he meant that he wrote down on a piece of paper something or other, and that is what he put in his pocket; that they gave him something; gave him something, a dollar bill, that he put in his pocket, and the slip that he got from the -- let us start at the beginning. See if you agree with me as to what I think he said. The people would give him something.

MR. MITCHELL: Yes.

THE COURT: He would write something down on a piece of paper; put the piece of paper in his pocket. Then he would tear the thing up that these people gave him, and some of the people gave him money, money which he put in his pocket. So I assume he means and intends to convey that the pocket was bulging from either or both, the money and the stuff he put in his pocket.

In the first instance, there wouldn't have been enough to create a bulge in his pocket, unless he already had something in there. On one occasion, two occasions, the automobile came and gave him something.

84 I don't recall what that was, and that would create the bulge. That is the testimony that I got.

MR. MALENOF: It seems to me that the testimony concerning automobiles is perfectly speculative. I think it is too speculative to permit introduction in respect to this business. The car stopped. He doesn't know what passed, if anything passed. He doesn't know what was said. It seems to me that is speculative to the point of hurting this man.

THE COURT: Except it all connects with other people, pedestrians who gave something, too, and it connects with the positive testimony that people gave him money. His actions, including Bigelow's,

are the same.

MR. MALENOF: And they saw something definitely passed? So far as the automobiles are concerned, they can't say what if anything was passed.

THE COURT: He can't say what was passed by anybody.

MR. MALENOF: Something was passed, but as far as the passenger or the driver of these cars are concerned, he can't testify that anything was passed.

THE COURT: He said in each case that they too gave the defendant something. The whole case may come to the point where we can't show what was passed, but it is too soon for that now.

(The Jury and witness were recalled)

85 Thereupon

ORVILLE CARTER

was recalled as a witness, and testified further as follows:

DIRECT EXAMINATION - Resumed

BY MR. CAPUTY:

Q. Before luncheon recess, you stated on September 26, 1957, that you had observed some people. Is that correct? A. Yes, sir.

Q. Where was that, and at what time? A. About twelve noon, September 26th, I observed these unidentified colored men and women contact Defendant Lewis and Defendant Lewis --

THE COURT: Where?

THE WITNESS: In the 1300 block of 9th Street, N. W.

THE COURT: Where were you?

THE WITNESS: I was standing in a vacant radio repair shop across the street from 1310-9th Street.

THE COURT: Across the street from 1310-9th Street?

THE WITNESS: Yes, sir.

THE COURT: And it was from there that you observed what you say about this defendant?

THE WITNESS: Yes, sir.

THE COURT: State what you saw and what you did.

THE WITNESS: I first observed Defendant Lewis walking up and down 9th Street, first to 9th and M, and then to 9th and O. I observed
86 four unidentified colored men and three unidentified colored women contact Defendant Lewis, hand him something. He would write something down; put something in his pocket, and --

THE COURT: What pocket?

THE WITNESS: Trousers pocket.

MR. MITCHELL: May I ask which one?

THE WITNESS: In his left trousers' pocket.

BY MR. CAPUTY:

Q. Then what else did you observe, if anything? A. Then he would tear these pieces of paper up that these unidentified men and women gave him.

Q. You said you observed four unidentified colored men and three unidentified colored women. Did they come together or separately?

A. They came separately.

Q. One at a time? A. Yes, sir.

Q. Now, did you observe anything else? A. I did, sir.

Q. What and where? A. About 12:45 p.m., I observed Private Bigelow contact Defendant Lewis in front of the delicatessen in the 1300 block of 9th Street, N.W. I didn't observe what Private Bigelow did.

87 Q. Did you discontinue your observations, or did you continue them on this day, September 26th? A. I continued them.

Q. Tell us what, if anything, you observed? A. About 12:52 --

MR. MITCHELL: I suggest the witness is reading from something.

THE COURT: Are you reading from your notes?

THE WITNESS: No, sir.

THE COURT: Go ahead.

THE WITNESS: Do you want me to put them away?

THE COURT: Don't refer to them unless you have to. If you have to refer to them, you may do so.

THE WITNESS: About 12:52, the same date, I observed Defendant Lewis leave the delicatessen in the 1300 block of 9th Street, with bulging pockets and enter 1310-9th Street without bulging pockets, and he opened

the door with the key which he had on a long chain.

BY MR. CAPUTY:

Q. What part of 1310-9th Street, N.W. is the door, what part?

A. The basement door.

Q. What else did you do, if anything? A. I observed Defendant Lewis come out about ten minutes after that without the bulge in his pocket.

88 Q. What did you do then? Don't refer to your notes. If your memory is exhausted, tell us. A. My memory is exhausted. I have to refer to my notes.

Q. You may. A. From 1:03 p.m., same date, until 2:17 p.m., I observed 13 unidentified colored men and six unidentified colored women.

Q. Were they together, or in that period of time? A. In that period of time.

Q. What did you observe? A. I observed them contact Defendant Lewis.

THE COURT: Let us be clear about it, together or separately.

THE WITNESS: Separately.

THE COURT: How many?

THE WITNESS: 19 altogether.

THE COURT: What date are you on now?

THE WITNESS: I am on the 26th, September 26th.

THE COURT: Same date. Go ahead. What did you do?

THE WITNESS: I observed these unidentified colored men and women contact Defendant Lewis in the 1300 block of 9th Street. They would hand him something, and he would write something down and put the piece of paper that he would write something down on, in his left shirt pocket, and tear up the piece of paper that these unidentified men and women would give him.

89 BY MR. CAPUTY:

Q. Can you tell us whether you observed anybody enter the premises of 1310-9th Street, N.W. on September 26th? A. My memory is exhausted. I will have to refer to my notes. About 2:20 p.m., I observed

Defendant Lewis and an unidentified colored man enter the premises 1310-9th Street, N. W., and this unidentified colored man entered with bulging pockets, remained three to five minutes and came out with Defendant Lewis.

Q. Were you able to observe his appearance after he came out of 1310-9th Street, N. W. ? A. I was.

Q. Tell us about it. A. This unidentified man came out of 1310-9th Street minus the bulge in his trousers.

Q. Did you continue the observation on that day, or tell us the time you discontinued the observation. A. I discontinued the observation about 3:00 p. m., sir.

Q. Tell us when, if any time, you saw the Defendant Lewis again after September 26th. A. Yes, sir, on September 28, 1957.

Q. Where and at what time ? A. I will have to refer to my notes. My memory is exhausted.

90 THE COURT: Go ahead.

THE WITNESS: About 12:00 noon, September 28, 1957, I observed Defendant Lewis walking up and down the 1300 block of 9th Street, N. W., from 9th and M to 9th and O, and I observed 31 unidentified colored men and 13 unidentified colored women --

THE COURT: 31 unidentified colored men and how many women ?

THE WITNESS: Thirteen. --contact Defendant Lewis from 12:00 noon until 1:50 p. m.

BY MR. CAPUTY:

Q. Collectively or separately did they contact him ? A. That was separately, and these unidentified colored men and women would hand Defendant Lewis something, and Defendant Lewis would write something down, and he would tear up the paper that these unidentified colored men gave him.

Q. What would he do after he wrote something down ? A. He would take the piece of paper that he wrote it down on and put it in his shirt pocket.

Q. Did you continue to observe on this date, September 28th ? A. I did, sir.

Q. Tell us, what if anything you observed? A. About 1:50 p.m., I observed a yellow Lincoln drive up by 1310-9th Street, and Defendant Lewis walked over to the Lincoln and the driver handed Defendant Lewis
91 something. Defendant Lewis put it in his pocket and went back to the sidewalk.

About 1:50, I observed a green Plymouth drive up to 1310-9th Street. I observed Defendant Lewis walk over to this Plymouth, and the man on the passenger side handed Defendant Lewis something, and he put it into his pocket and walked to the sidewalk.

About 1:40 p.m., I observed a tan Dodge Cab drive up besides the premises of 1310-9th Street, and Defendant Lewis walked over to the cab and the driver handed Defendant Lewis something, and he put it in his pocket, and he walked back to the sidewalk.

Q. Did you make any other observations on that date, September 28th? A. I will have to look at my notes.

Q. Will you refer to your notes? A. About 1:50 p.m., I observed Defendant Lewis and an unidentified colored man enter the premises 1310-9th Street by way of the basement, and this unidentified colored man had a brown paper bag in his hand when he entered 1310-9th Street.

Q. Did you see him leave, this unidentified colored man? A. Yes, sir. He remained about ten minutes and came out, minus the brown paper bag.

92 Q. Where were you at the time you made these observations on September 28th? A. I was standing in a vacant radio shop across the street from 1310-9th Street.

Q. Did you make any other observations of Defendant Lewis on any other date? A. I did, sir.

Q. What date? A. September 30, 1957.

Q. What time? A. I will have to refer to my notes.

Q. Is your memory exhausted? A. Yes, sir. About 1:38 p.m., September 30, 1957, I observed Defendant Lewis in premises 1310-9th Street, N.W. with bulging pockets.

About 1:50 p.m., I observed an unidentified colored woman enter the premises 1310-9th Street with a black bulging pocketbook. She re-

mained about ten or fifteen minutes. She came out with Defendant Lewis, minus the bulging pockets.

Q. Did you make any other observations?

THE COURT: You have been talking about a woman. Did you say pocket or pocketbook? You last said she came out with the minus bulging pockets. Did she have a pocketbook with her when she came out, and it didn't have a bulge in it? Is that what you meant?

93 THE WITNESS: Yes, sir.

BY MR. CAPUTY:

Q. Did you make any other observations on any other day? A. Only at the time of the raid.

Q. Did you take part in the raid? A. Yes, sir.

Q. Did you swear out a search warrant for 1310-9th Street, N.W.?
A. Yes, sir.

MR. MITCHELL: Object to that.

MR. CAPUTY: The effect of the search warrant?

MR. MITCHELL: My objection is to the evidence.

* * * *

109 ROBERT KISSNER,

Police Officer, was called as a witness on behalf of the government, and after having been first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. State your name and assignment. A. Robert G. Kissner, Corporal, assigned to the Gambling Squad, Metropolitan Police Department.

Q. How long have you been assigned to the Gambling Squad?
A. 3 1/2 years.

Q. Directing your attention to October 15th, were you a member of the raiding party that took place at 1310-9th Street, N.W., in the District of Columbia? A. I was.

Q. Was that pursuant to a search warrant? A. It was.

Q. Was there one in the possession of Defendant Lewis at the raiding party? A. There was.

Q. Who went with you to 1310-9th Street, N.W.? A. I went to 1310-9th Street, N.W. with Sergeant Foran, Officer Carter, Officer Bigelow, and Officer Mills.

110 Q. Prior to the time that you had gone to 1310-9th Street, N.W., pursuant to a search warrant, on October 1, 1957, can you tell us whether you made a record of any bills, any paper money, prior to the time you went there? A. I did.

Q. Did you make that recordation, yourself, sir? A. I did.

Q. I show you what has been marked Government's Exhibit No. 1 for identification, a paper and two one-dollar bills. I ask you to examine them and see if you can identify them. A. Yes.

Q. You identify the paper you have there? A. Yes, sir, I do.

Q. How do you identify the paper? A. I have my signature on the bottom of it.

Q. On that paper, can you tell us whether you made a record of the serial numbers of the two bills before you? A. I did.

Q. Did you place the serial numbers on the two bills before you? A. I did.

Q. What are the serial numbers?

MR. MITCHELL: Objection.

THE COURT: The evidence speaks for itself.

111 MR. CAPUTY: Very well, if your Honor please.

BY MR. CAPUTY:

Q. Directing your attention to October 1, 1957, the time of the raid, can you tell us how entrance was gained into the premises 1310-9th Street, N.W.? A. Yes. I went to 1310-9th Street, N.W. and went to the basement door with Sergeant Foran and Officer Bigelow. Sergeant Foran went down to the basement door, knocked on the door. The door was open, and he could see through the screen, and he said he had a search warrant and arrest warrant for the premises. He then entered the premises. I went in behind him.

Q. In the premises 1310-9th Street, N.W., can you tell us whether Defendant Lewis was there? A. He was.

Q. Do you see the Defendant Lewis in the Courtroom? A. I do.

MR. MITCHELL: Let the record show that I stipulate that the Defendant Lewis is sitting here.

BY MR. CAPUTY:

Q. Whereabouts in the premises was Defendant Lewis? A. When we entered the premises, he was standing in the hallway or areaway in the basement.

Q. What if anything did you do with relation to the Defendant Lewis after you entered the premises? A. Sergeant Foran identified
112 himself and placed the Defendant Lewis under arrest. I assisted Sergeant Foran. I made a search of the Defendant Lewis, and I took two slips of paper out of his clinched fist. They had some figures and numbers on them, and also searched him and took some money out of his pocket, and two marked one-dollar bills were in his trouser pocket, which compared with the serial numbers we had on those slips of paper.

Q. Are they the two marked pieces that you had on the Government's Exhibit No. 1? A. Yes, sir.

Q. Did you compare it with the record you had made? A. I did.

Q. Was it the same? A. It was.

MR. CAPUTY: May I have this marked as Government's Exhibit No. 2 for identification?

(The document above referred to was marked Government's Exhibit No. 2 for identification.)

BY MR. CAPUTY:

Q. I show you what has been marked as Government's Exhibit No. 2 for identification, which is a brown envelope containing some paper in it. I ask you to examine it and tell us whether you can identify it. A. I can.

113 Q. How do you identify the contents of Government's Exhibit No. 2 for identification? A. I have placed my initials on each of these two slips of paper.

Q. The contents of the envelope, the yellow papers? A. Yes, sir.

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CROSS EXAMINATION

BY MR. MITCHELL:

Q. What time did you go to the area, in the vicinity of the 1300 block of 9th Street, N. W., on the first day of October, 1957? A. About 1:50 p.m.

Q. Didn't you say that you went there with Officer Bigelow, Officer Mills, and who else did you say? A. I said I went to the front door of the basement with Officer Bigelow.

Q. Now, you had participated in the plans, had you not? A. Some of the plans.

Q. You know, isn't it a fact, that one of the plans was to allow the Defendant to get into his house before you did anything? A. I had no knowledge of it.

Q. Wasn't discussed in your presence? A. No, sir.

Q. Did you have knowledge of it later? A. No.

117 Q. Now, sir, you say you went to the house, and you were in company also with Sergeant Foran? A. Yes, sir.

Q. Will you tell what Sergeant Foran did to get into the house? A. Sergeant Foran went down the basement steps on the outside; went up to the door. The screen door which was on the inside door, was open.

Q. What do you mean that the screen door was on? A. There was a screen door which was on the outside.

Q. You don't mean that it was locked? A. It wasn't. The Sergeant knocked on the door. When he knocked on the door, he stated that he had the search warrant and an arrest warrant.

Q. To whom did he state that? A. He didn't say. He was looking in the screen door.

THE COURT: Do you know to whom he was talking?

THE WITNESS: I was right behind him. When I went in the area-way, in the hallway, Defendant Lewis was standing in the hallway with her.

BY MR. MITCHELL:

Q. At the time you say that Sergeant Foran knocked on the door and made this speech, you couldn't see inside? A. No, sir. I was standing behind him.

Q. Aren't you taller than Sergeant Foran? A. Yes, sir, but I wasn't up to the screen door, looking in. When you look in a screen, you
118 don't see inside the hallway, unless the light is proper.

Q. You didn't see at the time he made this arrest? A. I didn't see.

Q. After you got in the premises, later you saw the Defendant and this woman? A. That is right.

Q. After you had got into these premises, incidentally, no one came to the door and admitted you? A. No, sir.

Q. You didn't wait for anyone to come to the door and admit you?
A. I would say not.

Q. After you walked into the house, Corporal Kissner, Sergeant Foran said, in your presence, that he had a warrant for arrest and a warrant to search. Is that correct? A. That is right.

* * * *

120 Q. Now you saw some people in the house, did you? A. I did.

Q. And you arrested them, didn't you? A. We arrested some of them.

Q. You didn't see them do anything, did you? A. I did not.

* * * *

122 WILLIAM D. FORAN,

Police Officer, was called as a witness on behalf of the government, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. State your name and assignment. A. Sergeant William D. Foran, assigned to the Gambling and Liquor Squad, Morals Division, Metropolitan Police Department.

Q. How long have you been so assigned? A. Assigned to the Morals Division since the first of November, 1952.

Q. How about the Gambling Squad? A. Basically the same. I have been working with the Gambling Squad all during that period.

123 Q. Directing your attention to October 1st, armed with a search warrant, did you go to the premises 1310-9th Street, N. W., in the District of Columbia? A. I did.

Q. Who executed the search and the search warrant? A. I did.

Q. Will you tell us how entrance was obtained in the premises, 1310-9th Street, N. W. ? A. I was--

MR. MITCHELL: Objection to construction.

THE COURT: Yes, objection overruled.

THE WITNESS: I went to the basement door in the front of the premises; went down the steps to that door. I was followed by Corporal Kissner and Officer Bigelow. I got to the door. The door, itself, was open. There was a screen door that was closed. I knocked on the door. As I knocked, I looked in and saw Defendant Lewis in the hallway of the basement with a woman. I said, "I have a search warrant and arrest warrant for numbers." I walked in and arrested him.

* * * *

139 WILLIAM D. FORAN,
Police Officer, was recalled as a witness, and testified further as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Would you tell us, sir, how you gained entrance on October 1, 1957 into 1310-9th Street, N.W. ? A. I was accompanied by Corporal Kissner and Officer Bigelow, and went to the front basement entrance to premises 1310-9th Street, N. W. When I arrived at the door of the
140 basement entrance, the door itself was open. There was a screen door there, and I knocked on the door, and I looked in and saw Defendant Lewis standing in the hallway of the basement with a lady. I announced that I had search and arrest warrants for numbers. I opened the door, walked in, and placed Lewis under arrest. I turned him over to Kissner and went to the back door.

Q. Did you make a search of the premises? A. I did.

Q. Did you recover any money in the premises? A. I did, sir.

Q. How much did you recover in the premises?

MR. MITCHELL: Objection.

THE COURT: Objection overruled.

BY MR. CAPUTY:

Q. How much? A. \$3,367.51, seized on the premises itself.

THE COURT: How much?

THE WITNESS: \$3,367.51 from the premises.

* * * *

155 CROSS EXAMINATION

BY MR. MITCHELL:

Q. Sergeant, did you say you were an expert on numbers?

A. No, sir. I didn't say that.

* * * *

157 Q. Showing you Government's Exhibit 2(a), do you know who wrote those figures on there? A. I do not.

Q. Do you know when they were written on there? A. I do not.

Q. Do you know, as a matter of fact, that any money was bet on them at all? A. I do not.

158 Q. Now, for instance, sir, if I were to write -- suppose I wrote these numbers on a piece of paper myself and kept them in my pocket, and one of the numbers was to come out, would I get paid?

THE COURT: You don't have to answer that. It is a hypothetical question, at least unfinished. You say, "Suppose you wrote that number on a piece of paper, these numbers, and one of them hit, would you get paid?"

MR. MITCHELL: That is right.

THE COURT: You haven't hypothesized that you placed a bet with anybody.

MR. MITCHELL: That is precisely what I am after.

THE COURT: You haven't done that.

MR. MITCHELL: I thought I was predicating it on the prior question.

THE COURT: Indulge me by asking it over.

MR. MITCHELL: Very well.

BY MR. MITCHELL:

Q. Is it not true, Sergeant Foran, that in order to be paid for a number that hits, you must have played it with someone? A. That is true.

Q. Therefore, you don't have a receipt or a numbers slip until it is entered into the action of the numbers. Is that what you had in mind when you were explaining the numbers? A. I am not sure the way you
159 frame that question exactly what you mean. You don't have a play or numbers slip until it enters into the stream of the operation.

Q. Just what his Honor said, "Until you paid something on it."

A. You can bet on credit.

Q. Until such time that there is a contract, you don't have anything in the numbers, do you? A. No, sir, you don't have a bet. No, sir.

Q. With respect to Government's Exhibit 2(b), do you know who wrote those? A. I do not.

Q. Do you know when they were written? A. I do not.

Q. Do you know whether, as a matter of fact, any money was ever passed for it? A. I do not.

* * * *

163 BY MR. MITCHELL:

Q. Now, when you entered those premises, there were a number of people there, weren't there? A. Yes, sir.

Q. And what were they doing? What did you see them do? A. This one lady was out in the basement hallway with Mr. Lewis when I arrived there. There was another lady on the first floor of the premises, and there were two other ladies and a man in the recreation room.

Q. What were they doing, those who were in the recreation room?

THE COURT: Were they seated there?

THE WITNESS: Either seated or standing, yes, sir.

BY MR. MITCHELL:

Q. The question is: You didn't see them do anything? A. No, nothing. Other than being present, I didn't see them do anything.

164 Q. But you arrested them, didn't you? A. Yes, sir.

* * * *

165 Q. You said that you obtained three thousand and some odd dollars?
A. \$3,367.51, as I recall.

Q. Where did you get that from? A. \$3,000.00 of that money came from a chest of drawers, second floor front bedroom. The remainder of that money came from the kitchen.

Q. You asked him about the money, didn't you? A. Yes, sir.

Q. And you asked him the source of it, didn't you? A. Not at the scene. Later, I did.

Q. Eventually, you did? A. Yes, sir.

166 Q. He told you it represented his life savings, didn't he? A. That is right.

Q. As a matter of fact, he told you he received \$4,000.00 from mortgaging his house, didn't he?

MR. CAPUTY: Objection.

THE COURT: Objection overruled.

THE WITNESS: Yes, sir. He said he mortgaged his home in 1956 for the sum of \$4,000.00.

* * * *

167 THE WITNESS: He said he was employed.

THE COURT: I think I have no choice but to say to the Jury now, instead of later: Ladies and gentlemen, I have permitted, as you know, the objections of the prosecutor to the question by Mr. Mitchell, to this witness concerning what the defendant said, that he denied, that he was writing numbers. He said he mortgaged his house, and that is why he had this money and that this money represented his life savings, and that he was employed by the District Messenger Company. I think that is it.

While I permitted those questions to be asked and answered, and they were all answered, as you know in the affirmative, you are not to understand that is proof of the truth of the statements. That is not evidence of the truth of the statements at all. It is no proof that he was employed by this District Messenger Company, or no proof that this was his life savings, no proof that he mortgaged his house, and so on.

I will tell you at the proper time, if I don't have occasion to tell you before, that the burden of proof of the guilt of the defendant is on the Government and not on the defendant. I will elaborate on that at the proper time, but you must not be confused with this line of inquiry in the belief that the answers of the witness mean that it is proof of the truth of the statement made to the witness by the defendant, no proof one way
 168 or the other whether it is the truth or the other. The only proof of which it is capable is that the defendant did make those statements to this witness. Go ahead.

* * * *

173 REDIRECT EXAMINATION

BY MR. CAPUTY:

Q. Sergeant Foran, did you talk to the defendant concerning Government's Exhibit 2(a) and 2(b), the numbers slips? A. I did, sir.

174 Q. What did he say about them? A. He said they were, sir.

MR. CAPUTY: That is all I have.

RECROSS EXAMINATION

BY MR. MITCHELL:

Q. Now, tell us more. What else did he say about them? A. I asked the defendant if they listed slips that people had given him to place bets, and he said, "No," that they were slips containing bets that he himself planned to make.

Q. He told you that they were slips containing bets that he himself planned to make? They are not bets then, if your Honor please.

THE COURT: He hasn't said that they were.

MR. MITCHELL: Actually, what he said -- you asked him whether these were not numbers that he received or taken from numerous persons. Is that correct, sir?

THE WITNESS: If I might--

MR. MITCHELL: All I asked was: Is that correct?

THE COURT: He answer it in his own way.

THE WITNESS: I am trying to answer you without looking at this interrogatory statement. I can tell you exactly his exact words, the wording of his answer and the wording of his question, if I might read the

175 series of questions dealing with the possession of the slips, sir.

THE COURT: I guess you better tell what you are reading from.

THE WITNESS: I am reading from an interrogatory statement which was taken by Secretary Catherine E. Smith, in the Office of the Morals Division, at the time that I interrogated the defendant relative to the charge.

THE COURT: When was that?

THE WITNESS: At 4:15 p.m., on October 1, 1957.

THE COURT: And they are your questions and his answers typed by the Secretary?

THE WITNESS: That is correct.

"Q. What about the numbers slips we got from your hand?

"A. They were mine.

"Q. Were they numbers you took from people for bets?

"A. No. I was going to play with them.

"Q. Who were you going to play with?

"A. I can't answer that."

Those were the exact words that I used and the responses of the defendant.

BY MR. MITCHELL:

Q. You searched the house thoroughly, didn't you? A. I conducted this search.

176 Q. Was there any question in your mind whether you did or did not?

A. Well, I consider myself efficient in that category.

Q. You didn't find anything in the premises pertaining to numbers, did you? A. No.

* * * *

181 THE COURT: * * * *

We have 1501. We are concerned only with Sections 1501 and 1502.

MR. MITCHELL: Yes, sir.

THE COURT: If I understand you correctly, it would reduce itself to this ultimately, and that is that you could not prove that you could not convict a person of the separate individual defenses of the sale of a numbers slip or of possession of a numbers slips, if you also at the same time

want to convict him of operating and maintaining and acting as operator of a lottery, assuming that the sale and the possession are part of the transactions which will establish the operation of the lottery.

MR. MITCHELL: Substantially, that is correct, except the separate offense. There is no separate offense of sale.

THE COURT: So your position is that any selling leads to that ultimate unescapable conclusion, that the Government has to choose between charging a person with operating a lottery or charging him with making a sale or sales. You can't have both.

182 MR. MITCHELL: No, sir. I say if they charge him with making a sale within the scope of the statute, they have charged him with operating a lottery. That is one of the means of violating the statute.

THE COURT: Would you concede, as you must, I guess, in maintaining your position, that one sale of a numbers slip, one acceptance of a numbers bet is operating a lottery?

MR. MITCHELL: I don't like to do that.

THE COURT: No, I know you don't, but I think you are honest in your own deals that you have to do that to maintain your position here.

MR. MITCHELL: What I was about to say to your Honor was, I believe in the wording and manner in which the statute is worded, that is undoubtedly true. As a matter of practicality, I don't think you can use the term operating to mean one offense. It means more than one offense. It is a continuous offense.

The Government has seen fit to charge that it was a continuing offense. That it started on September 24th up to and including October 1st, so that they have covered the very period that they have set forth in the indictment in the subsequent count.

THE COURT: They have included it subsequently. They have included the separate offenses, the transactions, the very transactions upon which they base the first charge. That is the continuing main-
183 tenance of a lottery, and that is what you complain about?

MR. MITCHELL: That is right, and only because I want your Honor to see my position clearly with respect to the possession. Unless

they also are including, and I dare say they are in this case, they are including the very possession for the very purpose of attempting to establish the presumption. I don't know.

They are utilizing possession in this instance also to include Count 1. If that be true, I say the possession count is also true in the Count 1 of the indictment. It seems to me I could get the cases for you. I thought I brought that copy with me. Spies vs. U. S. and Gavers vs. U. S. I would like an opportunity if I might impose on my colleague to get those two cases for me, to present them to you.

There can be no question in my mind, for instance if we had such a law in the District of Columbia which allowed, and we do have a statute which allows for an added penalty in the case of the second conviction, when you treat this indictment, you can treat each one of these counts as a separate offense. That is the way the Government has seen fit to set it up. How can they hope to sever Count 1 of the indictment. The subsequent proof is well adduced with Counts 2, 3 and 4.

184 THE COURT: That is where you and I disagree.

MR. MITCHELL: If your Honor will look at the statute.

THE COURT: I just did. Mr. Caputy handed up to me one of your own cases where the operation of the lottery and the other count or counts were possession counts. I am so convinced that that is the law, and so convinced that it should be the law, that I am not going to take any more time on it. You made your point and made it clearly, and I am satisfied with you. I don't agree with it. I am going to deny that motion just as I did earlier when you made it.

MR. MITCHELL: Of course your Honor is rather adamant in his position. I knew about the cases. I ask your Honor to do this. I am not asking frivolously. I am very sincere. I might ask the Court to read the Spies and Gavers cases.

THE COURT: I will reconvene at 1:30. The Jury isn't coming until 1:40. I will reconvene early. I will read and consider it. I haven't a reputation of thumbing my nose at the Court of Appeals in public.

MR. MITCHELL: The Court of Appeals did not pass on the case because they say it was res seizin.

THE COURT: It is res seizin, and you are going to have a heck of a time to convince me.

(Whereupon, at 12:45 o'clock p. m., the hearing recessed, to reconvene at 1:30 o'clock p. m.)

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193

ROY FRALEY

was called as a witness on behalf of the defendant, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MITCHELL:

Q. State your name to the Court? A. Roy Fraley.

194

Q. Where are you employed? A. G. S. A.

Q. In what capacity? What do you do there? A. I am a window washer.

Q. Window washer? Are you an ex-service man? A. Yes, I am.

Q. Did you serve in the Marines? A. Yes.

Q. Mr. Carter stand. Do you know that gentleman? A. Yes.

Q. From where first did you know him? A. In the service together.

Q. In the Marine Corps? A. Yes, sir.

Q. Did you have occasion around the 26th of September to see Mr. Carter? A. I don't know just when the time was. I don't know what the date was.

Q. Did you see him? A. Yes, I seen him.

195

Q. Tell us where you were and what happened. A. I was on Alabama Avenue, getting ready to catch the bus, getting ready to come over town. He came up and tooted his horn and asked me was I going over town, so I said, "Yes". Him -- I don't know the other fellow. Got another fellow in there with him, and I got in the car with him.

Q. I ask you to stand, Mr. Bigelow. A. I wouldn't swear it was him. He was dressed in soldier's clothes. I was told he was a sergeant in the army.

Q. Go ahead. A. We got to talking about how they used to treat us on Paris Island where we were taking training. One of them said

they wanted a drink of whiskey. I told them I didn't have any money. I told them I didn't have much money. Both of them stopped at a liquor store and got half a pint of whisky. He drank some of the whisky, and I drank some of it, too.

I said I drank some of the whisky, and they did too. So they were getting ready to let me out. I asked what time it was. They said, "2:30 p. m." I said, "I want to play a number." Carter said, "I think I will play right behind you, play the same number you do." Carter said he didn't have any money, but the other fellow played the same number that I did, and the other fellow let him have a dollar to play the same number. They brought me over on 9th Street, and Carter, he was driving the car and the other fellow got out.

196 Q. Was Carter driving the car when you first saw him? A. No, he wasn't.

Q. Who was driving the car then? A. The other fellow was driving the car. That is after they got the whisky.

Q. That was after they got the whisky? A. Yes.

Q. Where did you go after you had drunk the whisky? Where did you go? A. Went to around the corner of 9th and O. He let me out there.

Q. Who let you out? A. Carter let me out. He was driving.

Q. Where did you go? A. Carter said he knew some girl on O Street. He and the other fellow walked down 9th Street.

Q. What happened then? A. The other fellow gave me the money to play the number with.

Q. This other man gave you the money to play some numbers with? A. Yes, sir.

Q. Go right ahead. A. So I went and played the numbers.

Q. Was this other fellow with you when you played the numbers?

197 A. He was standing on the side.

Q. Did you introduce him to anybody? A. No, I didn't.

Q. When you played the number, did you play it with this man?

A. No, I didn't.

Q. Do you know the person with whom you played the number?

A. I know him. His name is Quick. I know him when I see him.

Q. You are sure this other fellow gave you the money? A. Yes.
He gave me the money.

MR. MITCHELL: That is all.

* * * *

211 JAMES HENRY LEWIS,

Defendant, was called as a witness in his own behalf, and after having been first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. MITCHELL:

Q. State your name to the Court. A. James Henry Lewis.

Q. Where do you live, sir? A. 1310-9th Street, N. W.

Q. How long have you resided in the District of Columbia?

A. 23 years.

Q. Now, where are you employed and by whom? A. I am employed by the District Messenger Company.

Q. Who is the operator of that enterprise? A. Mr. Sapoznick.

THE COURT: How do you spell the last name?

THE WITNESS: I couldn't spell it.

MR. MITCHELL: I can. L-O-U-I-S S-A-P-O-Z-N-I-C-K.

BY MR. MITCHELL:

212 Q. How long have you been employed by Mr. Sapoznick? A. Five years.

Q. Approximately five years? A. Five years. This is the fifth year.

Q. Calling your attention, sir, to the date of September 24th, and calling your attention, sir, to the officer who has been identified in Court as being Officer Bigelow, I ask you, sir, if you at or about that time saw Officer Bigelow? A. On the 24th of September?

Q. Yes. A. I did not.

Q. You have heard the testimony of Officer Bigelow, that on that date he and together with another man whom we have later determined was Mr. Roy Fraley, played the numbers with you on that day. A. No.

Q. Mr. Bigelow says that he played the numbers with you on September 27th. A. Mr. Bigelow contacted me that day.

Q. Sir? A. He contacted me that day. He spoke to me.

THE COURT: On what day?

THE WITNESS: The 27th.

BY MR. MITCHELL:

213 Q. Tell the Court and Jury exactly what happened. A. He asked me. I was in the restaurant, and he called me outside, and he told me he wanted to play a number. I said, "Go ahead and play it." He said, "You had my money the other day on 82. I want my money." I said, "You have the wrong fellow." I went out and down the street. This restaurant was on the corner of 9th and O.

Q. Did you have any contact with Officer Bigelow subsequent to that time? A. He came every day with the same story.

THE COURT: What do you mean by that?

THE WITNESS: Every day he wanted to play a number. He had on army khaki pants and a little hat, every day.

BY MR. MITCHELL:

Q. What would happen? A. I told him I wasn't no number writer..

Q. Now, did there come a time on October 1st that you saw Officer Bigelow in your house? A. I did.

Q. What happened on that occasion, sir? A. He came in and with the rest of the officers, and him and two other colored officers and three white officers. Bigelow came in. He didn't say anything all the time he was there, never opened his mouth.

214 Q. Tell us what happened there. A. The police came in. They said, "Stand still, stand still, stand still. We want to search you. We have a search warrant." They searched me. They never showed me the warrant until they got ready to leave, because Abee who was arrested with me asked for the search warrant. They were awfully busy, busy to death, trying to find some numbers.

Q. Tell us what happened. A. After they got me quieted, I was a little upset, after they got me quieted, they went in my pocket. They took out \$422.00 in bills. In the meantime, when they took it out of my pocket,

I had a lady who cleans the house for me there. They had ran upstairs and brought her down; took her off her knees. She was scrubbing the floors, and brought her downstairs.

I went out to pacify her. Told her nothing was going to happen to her. She sat down. They were out to get me. When I got out, they had two one-dollar bills, marked money. They said they took it out of my money.

Q. What did you say? A. I said I didn't know how it got in my pocket. They said for me to keep quiet, so I kept quiet.

Q. On that day, did Mr. Bigelow give you any money? A. He did not. I didn't see him until he comes in the house.

215 Q. When you saw him in the house, that was the first time you seen him that day? A. That is correct.

Q. Did Mr. Bigelow at any time during that period, between the 24th of September and October 1st, give any money to you? A. No, but he tried that every day. Every day he would wait for me when I come down ~~the~~ street. I come there from work. He was waiting for me, to come down to play a number.

Q. You saw the pieces of paper? I am now showing the witness Government's Exhibit 2(a) and 2(b). You saw these two pieces of paper which have been marked and introduced as Government's Exhibit 2(a) and 2(b)? Can you identify either of those pieces of paper? A. I can one of them.

THE COURT: Which one?

THE WITNESS: This one.

THE COURT: The white one?

MR. MITCHELL: That is 2(b), your Honor.

THE COURT: All right.

BY MR. MITCHELL:

Q. You identify that? A. Yes, sir.

216 Q. How do you identify that, Mr. Lewis? A. When they come in, I picked it off the floor, and had it in my hands. Also had two pieces of another one, I imagine is similar.

Q. You say there was another piece of paper approximately the same size? A. Approximately the same size as this.

Q. How about that yellow piece of paper? A. I don't know nothing about it.

Q. Was that shown to you? Was that taken from your hand?

A. No, this wasn't. This one and another white one was.

Q. Where did this piece of paper, that is Exhibit 2(b) and the other piece of paper which is not here, come from? A. There were six people in the house. The police were going in the place. Everybody gets excited. They dropped two pieces, and I picked them up, so I had them in my hand.

Q. What is the nature of your employment? What do you do for Mr. Sapoznick? A. I collect rents for him; take care of things that break down in the night.

Q. You take care of properties and collect rents? A. That is right.

217 THE COURT: What do you mean when you say, "Take care of things that break down in the night?"

THE WITNESS: I meant, your Honor, those houses he has got there, and sometimes fuses blow, the plumbing breaks down. Sometimes, when they have a little child, they break the windows, and I board it up.

BY MR. MITCHELL:

Q. You also collect rents? A. I do, sir.

Q. Do you have any roomers in your house? A. I have two at the present time.

Q. How many roomers did you have in your house as of October 1, 1957? A. Only had the two at that time.

MR. MITCHELL: Your witness. There is a question I did fail to ask the witness.

BY MR. MITCHELL:

Q. Mr. Lewis, there was testimony that there was taken from your possession or from your premises, \$3,000.00, \$3,367.00. A. Yes, sir.

Q. Whose money was that? A. That was mine that I had gotten on a loan. Part of it, some of it had been spent.

Q. Some of it had been spent? A. Yes, sir.

218 Q. From whom did you get it? A. From Mr. Sapoznick.

Q. From your employer? A. Yes, sir.

Q. When did you get it? A. In April, 1956.

Q. The money was obtained as a result of what? A. Of a loan.

Q. Was that secured by a mortgage? A. It was.

MR. MITCHELL: Your witness.

CROSS EXAMINATION

BY MR. CAPUTY:

Q. Stand up, Officer Bigelow. Is that the man, Officer Bigelow, that you had a conversation with? A. That is correct.

Q. You say it was September 27th? A. It was, I say, the 27th, the 26th. I don't know the exact date.

* * * *

219 Q. It is your testimony you never took a bet from him? A. That is correct.

* * * *

220 Q. It is your testimony, sir, that you played no bets of any kind with this individual. Is that correct? A. I don't follow it. You said I played some with him?

Q. That he made no bets with you? A. That is what I said.

Q. At no time? A. That is correct.

* * * *

227

LOUIS SAPOZNICK

was called as a witness on behalf of the defendant, and having been first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. MITCHELL:

Q. What is your name, sir? A. Louis Sapoznick.

Q. Where do you live, Mr. Sapoznick? A. 9342 Duberry Avenue, Lima, Maryland.

Q. Do you operate a business in the District of Columbia?

A. I do.

Q. What is the name of that, sir? A. District Messenger Service, is one.

Q. And do you have other businesses? A. Yes.

Q. And the District Messenger Service is located where?

228 A. 1426 - 9th Street, N. W.

Q. Do you know the defendant, James H. Lewis? A. Yes, sir.

Q. Is he in your employ? A. Yes, sir.

Q. How long has he been so employed? A. About five years.

Q. What is his present salary? A. \$75.00 a week.

Q. What is the character of his duties with you?

THE COURT: Fix the time as of then.

BY MR. CAPUTY:

Q. As of September and October, 1957, what were his duties?

A. Oh, he takes care, mainly, of real estate I have on 9th Street.

Q. Does he engage in collections? A. That is right.

Q. Did there come a time, Mr. Sapoznick, that a loan or mortgage was made on his premises? A. That is right. There was a loan.

Q. Did you make that loan?

MR. CAPUTY: I object to the further consideration on the ground of remoteness.

229 THE COURT: I will permit that. It is a matter of value, of weight, not admissibility. I permitted the witness, the defendant, to testify, because he identified the money found in his house in that

fashion. It is a question of weight and value, not admissibility. Did you make him a loan?

THE WITNESS: Yes, sir.

THE COURT: When?

THE WITNESS: Sometime last year. I don't know the exact year.

THE COURT: 1957.

THE WITNESS: Actually prior to that.

THE COURT: When did you make him the loan? How much was it, and when did you make it?

THE WITNESS: It was \$4,000.00. I don't know the exact date. I only have a note there.

BY MR. MITCHELL:

Q. I now show you Defendant's Exhibit 2 for identification, and I will ask you, sir, if you can identify that document. A. Yes, sir.

Q. Would you tell the Court what you identify it as? A. This is a note he gave me for a personal loan I made to James H. Lewis.

Q. The amount? A. \$4,000.00.

230 THE COURT: You are going to offer it?

MR. MITCHELL: Yes, sir.

THE COURT: It may be received.

(The document above referred to, marked Defendant's Exhibit No. 2 for identification, was received in evidence.)

* * * * *

236 THE COURT: * * * I am going to excuse the jury and ask you to come in chambers and talk to me, and the reporter also. I am not

237 satisfied in my mind about the ruling on the motion to compel an election.

* * * * *

(IN CHAMBERS)

THE COURT: I am hard to convince when I get my mind set on something, but last night I began to waver a little bit and I am still wavering about the question of the election. I am inclined to think that this situation does differ from that of a narcotics case, where one transaction does violate two different statutes and three separate sections, or two statutes.

As I recall it, this is one statute which does denounce, as I see it, three different offenses, or says that there are three different ways in which one offense can be committed, and it would follow that if a man consistently, for a substantial period of time, sells lottery tickets, he is thereby operating a lottery, because the statute says further whoever
 238 does that is operating a lottery.

I don't believe if he sells one of them or two of them or maybe three of them from time to time -- I don't know. We don't have to deal with them -- he would be operating a lottery. I think it has to be numerous enough to make it a substantial selling operation, to substantiate a lottery. When he does that, he is operating a lottery, and each time he does it, he commits an offense, because it is against the law to accept a numbers bet or sell a ticket in a lottery. So that the proof of those Counts 2, 3, 4, and 5, I guess, although five is a separate, under a separate statute, 2, 3, and 4. The proof under those three counts prove Count 1. Count 1 has got to be proved by proof of sale of lottery tickets or authority to sell by someone else, lottery tickets.

I am wondering now if counsel for defendant aren't right; that you have got to go the jury now, separating Count 1 from the three other counts. I am doubtful if you can go on both. I know I couldn't sentence separately, but I think they may be possibly the same.

* * * *

243 Contrary, one argument of the appellant, was the inference permitted by the statute, falls short of the actual; that it is the duty of the appellant to prove his innocence and Coleman talks about prima facie evidence. It means only the burden shall be upon the person in possession to justify when accused of the crime that the statute creates, and I am surprised that this question has not specifically in the past been raised and clearly passed upon by the Court of Appeals, and I don't think it has.

I will adhere to my original ruling if they convict him, and you want to take an appeal, I will grant it. I think the question should be granted, and I think the only way to do it is to rule in favor of you instead

of us. Let us find you can take what is left of his \$3300.00. After you get your slice, you can take that sliver that is left and appeal. I will let my ruling stand on that.

* * * *

249 MR. CAPUTY: * * * Private Bigelow told that he played the numbers with this defendant on that day, and he had given the defendant the two recorded dollar bills. We then have the evidence of members who went there in execution of that search warrant, and we presented for your consideration, Corporal Kissner, who told you he was a member of the party who went to the premises 1310-9th Street pursuant to that search warrant, and he also had an arrest warrant, and it was the testimony of Corporal Kissner that when he got into the premises, he took from the hands of this defendant, I believe they are Government's Exhibits 2(a) and 2(b), which are numbers slips, and that he had also taken from the pockets of this defendant money amounting to over \$400.00, and that included in the \$400.00, which were taken from this defendant, were the two recorded one-dollar bills which earlier Private Bigelow had played with this defendant, and the evidence is that the recorded dollar bills which are in evidence, were checked. The serial numbers were checked with the record made by the Police Headquarters, and the evidence will show that from the premises a little over \$3,000.00 was taken.

* * * *

268 I say to you, his Honor will charge you that possession of numbers slips, and there is evidence that they are numbers slips, are prima facie evidence that this defendant was operating a lottery, so for some unknown reason they have money. What difference does it make? It was borrowed on April, 1956. What difference does it make? Can you say that was the same money which he had borrowed in April, 1956 and kept it right along in his premises, and he also comes in and tells you that the defendant is working from four to twelve, and you as reasonable men and women, known when horse races go on, and you as reasonable men and women know that numbers go on from eleven to three, and this individual goes to work at four o'clock.

* * * *

272 MR. MITCHELL: * * * That is a conclusion. Where the man says I have some numbers that I myself had written, which I intend or I might play, or I am going to play. It doesn't become a lottery until it is played.

THE COURT: But it is paraphernalia of one kind or another. It is a piece of paper to be used in a lottery.

MR. MITCHELL: You would have to say this identical paper was used to write down some horse racing numbers. People who play the numbers write them down. I write them down, myself, so I will remember them, on a piece of paper. When I see a man who is a numbers writer, I give him 125 at 25¢, and so on, and I will read off from this piece of paper the numbers I want to play. Then he throws it away.

THE COURT: What do the words "to be used" mean? It has been taken by a writer and is to be put in a stream of the operation.

MR. MITCHELL: That is right.

THE COURT: I think you are entitled to that kind of an instruction. I will give that in substance.

MR. MITCHELL: The one other sole remaining thing, I think your Honor knows that, has indicated it previously what your purpose is. Mr. Caputy in arguing to the jury said, "His Honor is going to instruct the jury that possession is prima facie evidence." I want to call your
273 attention to the case that is controlling. It is the McAdams vs. U.S. case, because it says you cannot do that. You weren't to do that.

THE COURT: Weren't to do what?

MR. MITCHELL: Instruct the jury as to what constitutes prima facie evidence. Your Honor did state previously, but you didn't do that. You only told the jury what prima facie is rather than to tell the jury that this is prima facie evidence.

THE COURT: The statute says so. The Maynard case approved the instructions as given, which did not explain what prima facie means. I explained what prima facie means. It means on the face of it. At first glance it seems to be. It isn't controlling at all.

MR. MITCHELL: The statute says then and there. You have to

take it then and there, and under the circumstances, not something else.

THE COURT: 1501 has not been enlarged, and prima facie, the possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device, shall be prima facie that the possessor of such copy or record did at the time and place of such possession keep, set up, or promote, or was at such time and place concerned as owner, agent or clerk or otherwise in managing, carrying on or promoting or advertising a lottery.

* * * * *

275

JURY CHARGE

THE COURT: Ladies and gentlemen of the jury, at the outset of these instructions, I must tell you this. Mr. Mitchell, this morning, had asked the reporter to find in her notes, her record of some testimony that had been given concerning the bet that the witness Bigelow said he made on October 1st, and the reporter found it and gave Mr. Mitchell that information which he used in the course of his argument. During the luncheon recess, the reporter in checking her notes, found that she had not given all of the quotation, and she has written it up for me and I must read to you the exact quotation. It is as follows, and has to do with October 1st:

"Q What numbers did you play?

"A My memory is exhausted as to the exact numbers and amounts.

"THE COURT: When was this?

"THE WITNESS: October 1st.

"THE COURT: All right.

"THE WITNESS: On October 1st, the numbers I have played with Defendant Lewis were 325-50¢ and 265-50¢, and an 82 parlay, and the \$2.00 I paid him for the numbers bet the serial numbers have been recorded earlier in the morning in the Morals Office, Metropolitan Police Department, and those were in bills I used."

276

Now, as you have been told, and properly so, your recollection of all of the testimony is what really controls, but in view of the fact that this small piece of the evidence was taken out of the context inadvertently,

I felt you must have the whole of it.

Now, there are certain general principles of law which are applicable in all criminal cases, and, therefore, are applied to this one, and the first of these is that the indictment in the case is not evidence against the defendant. The indictment contains a series of several charges against the defendant, and they are nothing more than accusations against him, and he is presumed in law to be innocent of each of those accusations, and since it is a presumption of law, that presumption is sufficient to acquit him of the charges against him, unless you are satisfied from the evidence beyond a reasonable doubt of his guilt, because the burden in a criminal case is always upon the Government to prove guilt beyond a reasonable doubt, but never upon the defendant to prove his innocence, and that burden is not sustained by a strong suspicion of guilt or probability of guilt. It has to be absolutely established beyond a reasonable doubt.

That term in the law means what you think it means in your daily vocabulary. It means in short, under all the circumstances, a doubt which is reasonable, a doubt which is founded upon reason, and it arises if it does at all, out of the evidence in the case, or lack of necessary
 277 evidence in the case. If you think there is a lack, there is such a doubt that after a full and fair consideration of all of the evidence, it leaves a juror's mind so undecided that he does not have an abiding feeling of guilt which would remain unchangeable by further reflection.

It is also defined as the kind of doubt that would cause a reasonably prudent person to take into account, the importance of his own affairs. Now, such a doubt cannot properly arise in law by mere conjecture or speculation, whim or caprice, or reluctance to convict through a feeling of sympathy or mercy. It contemplates the conscientious belief from the evidence that there is a reason to doubt the guilt.

Of course, the law does not require proof beyond all reasonable doubt. To assert this, it happens that between human beings there is a feeling which can seldom be established without sympathy. It does say no person can be deprived of his life, liberty and property unless his

guilt is established beyond all reasonable doubt.

Now, in determining whether the defendant is guilty or innocent of one or more of the several charges levelled against him here, you must evaluate the testimony of every individual who took the witness stand, and, of course, consider the physical evidence in the case as well. Only by doing so can you ascertain the truth, and it is the truth you seek.

278 To the task of evaluating evidence, you should call upon for your assistance, your own good common sense, your own experiences in life, your knowledge of human nature, your ability to judge people, and take into account their opportunities for observation, their intelligence, their motives, if you are able to discern them, and take into account the manner and demeanor, and the conduct of the witnesses on the stand. Are they straight-forward, candid, or do they seem to be evasive? Do you find inconsistencies and discrepancies in the story they tell, either within the story of the witness himself, or in his story as contrasted by the story of some other witness or witnesses, and if you find such inconsistencies and discrepancies, then you must inquire in your mind as to the nature of the inconsistencies. Is it the kind that you would expect to find, not colored in the narrative given by a truthful person, concerning a past event, or rather the kind of inconsistency you would expect in the company of falsehood and not truth?

Now, interest in those things involved in the controversy of people, involving friendship or animosity toward people concerned in the case, and many other human factors may or may not affect the desire or the capacity of a witness to tell the truth.

You give to the testimony of each witness that weight which you think it is entitled when viewed in the light of these considerations, and
279 when taken in the context of the whole of the evidence. I have had occasion to say to at least some of you before that I believe there is no such thing as a witness standing -- the testimony of a witness, of a single witness standing alone. To be sure, you may believe one person far more than you do another. One witness may impress you much more favorably than another. You may give greater credence to one than

another, but in the final analysis, you must judge the one along with all the others, and against the backdrop of all the circumstances as they have been portrayed to you during the trial. Having done so, you give to the testimony of that witness the weight you think it is entitled when so viewed.

If you believe anyone testified falsely concerning a matter to which he could not be reasonably mistaken, you may disregard his testimony, either in whole or in part as the case may be.

Now, the indictment in this case is in seven counts. That is to say there were seven charges brought against this defendant. You will not concern yourselves with two of them. The last two, the sixth and seventh counts of this indictment have been dismissed, and they, therefore, will not be for your consideration, so when I give to you this indictment, simply ignore them. Don't take the time to read the last two counts, because you would be cluttering up your minds with immateriality.

280 The other two counts are in the case, and you must consider them separately, and your verdict will be rendered as to each count separately, either guilty or not guilty of each count separately.

Now, the first count charges this defendant with operating a lottery. Put it in simple language. The charge reads as follows: "Continuously, during the period from about September 24, 1957 to about October 1, 1957, within the District of Columbia, James H. Lewis was concerned as owner, agent and clerk and in other ways in managing, carrying on, and promoting a lottery known as the numbers game. Now, that language is described in the words of the statute which denounces the numbers game as an offense, as a lottery, and therefore, an offense against the law.

I will read the pertinent part of the statute under which the first count is brought. It says this: "If any person shall within the District of Columbia keep, set up or promote, or be concerned as owner, agent or clerk or in any other manner in managing, carrying on, promoting or advertising, directly or indirectly, any policy lottery, policy job, or any lottery." Now, that is the first part of it -- "shall be guilty," which as I say boiled down, the charge is that he operated a lottery known as the

numbers game. You have had evidence as to what the numbers game is. The evidence tells you that it is a game of chance, and that there is no
 281 skill involved, and the law is lottery must be a game of chance because one gets a reward not through any skill or effort of his own, but based upon his taking a chance in a game of chance and winning, he gets his reward. By winning, that is the lottery and the numbers game in its operation has been described to you sufficiently, so there is no need for me to elaborate upon that. That then is the charge in the first count, that he was either the owner or the agent, or the clerk, and he managed and carried on or promoted a lottery.

Now, the nature of that charge connotes something more than one transaction, say, one sale of a chance in a lottery, the taking of one bet on a number. It means the operation of a lottery, not just some isolated case, but a fairly systematic, continuing operation. There is no time limit set either by the statute or by the courts as to how long you have to engage in this kind of enterprise in order to become an operator of a lottery. Common sense and reasonableness is the rule of thumb which guides you in that respect. There have got to be more than one or two isolated transactions. There has got to be some continuity of conduct to create a lottery. I mean to create the operation, bring into being the operation, the maintenance, the managing of a lottery. So much, for the moment at least for the first count.

The second and third and fourth counts of this indictment are identical, except for the dates. The first count reads as follows: "At, on or
 282 about September 24, 1957, within the District of Columbia, James H. Lewis sold and transferred to Houston Bigelow a chance, right and interest in a lottery known as the numbers game, so that count charges this defendant with selling a lottery ticket, or taking a lottery bet. It does not charge him with operating a lottery. It charges him with taking a lottery bet, selling a lottery chance in a lottery.

The third count is exactly the same, except it says the date was September 27th, instead of the 24th. The fourth count is exactly the same, except it says the bet was taken on October 1st instead of the 27th,

so those three counts are exactly the same.

The fifth count, the last one with which you will be concerned, reads as follows: "That on or about October 1, 1957, within the District of Columbia, James H. Lewis had in his possession and under his control, notations, records, receipts, tickets, certificates, bills, obligations, tokens, papers and writings, current and not current, used and to be used in a lottery, known as the numbers game."

Now, the statute under which that count is laid, a separate statute, denounces the possession of lottery tickets, and it reads as follows:

"If any person shall within the District of Columbia, have in his possession knowingly any ticket, certificate, bill, slip, token, paper, writing,
283 or other device used or to be used or adapted, devised or designed for the purpose of playing, carrying on, or conducting any lottery or the game or device commonly known as policy lottery or policy and the numbers game, shall be guilty of an offense, so that the first count charges the operation of a lottery."

The next three counts charge the sale of a chance. The fifth count charges the possession of a lottery ticket or piece of paper. Now, with respect to that last count, you have heard the testimony on the part of the defendant when he testified on the stand as the police officer said he told him when he was arrested, and he did have this slip of paper, but it was for his own use, numbers that he was to play in a lottery.

Now, you must have in mind in dealing with the fifth count of the indictment, first, you have got to find beyond a reasonable doubt that he did have in his possession a slip of paper, which was a numbers slip. You have got to find that that slip of paper either -- either or both the police officers said there were two, the yellow one and the white one. He said they were both his. He denies any knowledge of the yellow piece, but he says the other one was his. He picked it up off the floor, but he said that it was his slip of paper that he intended to play.

284 Now, if he had that in his possession, and it had not been used yet in the lottery operation, if there was one then it would not be a numbers slip within the meaning of the law. An example of that is this. Suppose

I decide, and suppose to be specific that tomorrow I am going to make a bet on the numbers, and I decide that I am going to bet on 150 and 151, and I write them down so I can't forget. I have a hunch, maybe, but tomorrow it will be gone, but I think it is good today. I write them down so I will remember them tomorrow. I write them down on a slip of paper like that. I get arrested. If that is all it is, a reminder to me that I am going to play them tomorrow, it isn't a numbers slip, because it hasn't got into the stream of the lottery operation. I haven't put it in the mill, but if there is a record, if either of these slips of paper is a record of numbers bets that have been taken, to be used that day, or already used as the case may be, if there is a record on those two slips of paper or either one of them of numbers bets that have been made, that have been taken and now are in the mill, used in the project, in the operation of a lottery, then they are numbers slips, and if you believe he had them and if they were of such a character, he would be guilty, unless you have a reasonable doubt.

With respect to the second, third and fourth counts of the indictment which charges he sold a chance, that he sold or Houston Bigelow said he
 285 sold a chance, right and interest in a lottery known as the numbers game, if Bigelow gave the defendant money on a chance in the numbers game, that is if you believe he gave Lewis money as a bet in the numbers game, that is a violation for Lewis to sell the chance and take the money. That is a violation of the law as I have read it to you, and he would be guilty of selling the chance.

If you don't have a reasonable doubt about it, he is guilty. If you have a reasonable doubt about it, he would not be guilty. As I said about Count 5, the money must be paid to make a bet on the numbers. I haven't put it in the stream. If I give a man some money and tell him that is the money I want to bet it and he takes it for the purpose of putting it into the lottery operation. Then the offense is complete.

Back now to the first count, which is the one which charges this defendant with having carried on a lottery, operating a lottery. There is a clause in the statute which denounces the offense of operating a

lottery, which I shall read to you. It says, "The possession of any copy or record, or any such chance, right or interest, or of any such ticket, certificate, bill, token, or other device, shall be prima facie evidence that the possessor of such copy or record did at the time and place of such possession, keep, set up, or promote or was at such time and place concerned as owner, agent or clerk, or otherwise, in managing, carrying on, promoting, or advertising a lottery. That means the possession of a piece of paper containing a record of numbers bets is on the face of it an indication that the person who possesses that slip of paper is engaged in the operation of a lottery, and again, of course, you must find that it was used or to be used at that time in the operation of a lottery. That is all that the Latin term "prima facie" means. That is on the face of it, without explanation, without circumstance, to give it a different light on the face of it. It is an indication that it is being used at that time in the operation of a lottery.

Now, I think I am through gentlemen, unless either one of you have something to suggest. There is one more thing I want to say to you. You have heard during the course of the testimony some references made by the lawyers and witnesses concerning a search warrant and a return of the search warrant. I thought I better tell you what they were talking about, so you won't get off on some terrible orbit.

The statute requires under certain circumstances that a search warrant be issued by a magistrate, before a house or building can be searched. It is executed as the term is used by taking the warrant to the premises by a law-enforcement officer, police officer, or United States Marshal, or Sheriff, and making the search. Having made the search, then he must write on the back of the warrant itself, and on the back of the copy of the warrant what it is that he finds and takes. I don't mean that he has to write down what furniture there was in the dining room, a table, bed, and that kind of thing, but anything that he finds and takes, he has got to record.

The original of that is filed in Court, and a copy is left on the premises, and that is all that means. I see no reason for you to be

concerned about it, but it kept being referred to for perfectly valid reasons at the time, in the evidence. I thought you must be wondering what it is all about, and that is all it is.

There is one clause also in the statute denouncing the possession of numbers slips referred to, which has reference to the fifth count of this indictment, which I should also read. I will read the statute again so you will understand what I am talking about.

The fifth count is laid under this statute. "If any person shall within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate and slip, token, paper or writing, current or not current, used or to be used," is violating the provisions of the statute which I have read to you denouncing a lottery, "he shall be guilty of an offense." For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, token, paper, or writing, shall be presumed to be knowingly in possession thereof.

Now, gentlemen, unless there is something you have to suggest, I think that is all I have.

* * * * *

290 THE COURT: Counsel has led me to remember you haven't the exhibits that are in evidence, and I will send them in.

With respect to the fifth count of this indictment, which is the possession count, the evidence on that score is this. The police officer said that these two slips of paper, the yellow one and the white one,

291 which are exhibits 2(a) and 2(b), were taken from the possession or from the hand of the defendant in that house, and the police officers said that. Sergeant Foran said that when he interrogated, he wrote down the questions and the answers. He asked the defendant about these two slips of paper, and he asked him if they were not his. He said, "Yes, they were his. They were numbers bets he was to make," and in answer to Mr. Caputy, he said that the slips of paper, one of them, the yellow slip -- no, he didn't; never saw it before. He denies that was in his hand, which the police officer said it was, but with respect to the

other one, he said there was excitement in the place and that this piece of paper was on the floor and he picked it up, and that in answer to Mr. Caputy's question, "Didn't the police take it from your hand," he said, "Yes, the police took it from my hand," and that he did tell Sergeant Foran that there was a record on that white piece of paper, of numbers he was going to play.

If you believe that the slip of paper which he had in his hand he said had been dropped by somebody else, then he wasn't in possession of it in the true sense at all. It was a record of something he was going to play and hadn't got into the commerce, into the stream of the lottery traffic, then it wasn't a lottery operation at all.

292 It is for you to say, and I don't think it is very difficult. You either believe one thing or the other. You either have a reasonable doubt of his possession, as the law contemplates it, or you don't. Now, as I told you before, these counts must be considered by you separately. You could find a verdict of guilty on the first count of the indictment and not guilty of the other four, guilty of any one or more and not all, of guilty of any one or more, or all, or not guilty of all, guilty of all, guilty of none, or guilty of one, or guilty of the other. Each count must be considered separately. You may take the case. I will send the exhibits out for you. Please be sure we get the two dollars back. You may take the case.

* * * * *

297 THE COURT: Members of the Jury, I have your first note which asks this: "Could you please give us information on Mr. Carter's testimony as to if he saw Mr. Bigelow make a contact with the defendant on any day." We have had the reporter check her notes concerning that, and to do so has taken us some considerable time, which is the reason for the delay. The reporter has the references marked. I will ask her to read. What she reads will be on Mr. Caputy's direct examination of the witness Carter, and it has reference to September 26th.

You have sent to me a second note to be explained, to clarify it. I tried when I charged you originally to simplify this. Apparently, I

didn't succeed. I will try again. I will do it in pretty much the same manner so I won't complicate for you what I thought was not a complicated matter at all, but for you the first count contains a lot of words. They all, however, have to do with how to operate, how a lottery can be operated, what connection one may have to have had a lottery, in order to be charged with and guilty of operating a lottery.

298 As I told you, that is what the first count charges, that this defendant operated a lottery continuously during the period from about September 24th to about October 1, 1957, and the indictment charges that. He says that during that period of time he was concerned as owner. This is put in the indictment in the conjunctive. I am going to put it in the disjunctive. Charged him as being owner or agent or clerk, or in other ways in managing or carrying on, or promoting a lottery known as the numbers game.

As I told you earlier, I repeat again. This first count of the indictment connotes something more than an individual sale of a chance in a lottery. That is a separate, total offense and such an offense as they are charged in the second, third and fourth counts of the indictment, would connote something more than a single chance of a lottery, of a numbers slip. It connotes the operation of a lottery, the continuing operation of a lottery. The charge here is he continuously did so from about September 24th to about October 1st. The law doesn't fix any certain time either. The law doesn't fix any certain number of transactions which are necessary to be established beyond a reasonable doubt to prove a charge of maintaining or operating, or promoting a lottery.

The rule of reason applies, and as it does in so many ways in our laws. The rule of reason applies to anything as it does in this case. If
299 you could show one transaction; that this defendant sold one chance in a lottery, in a numbers game, or had one piece of paper in his possession on one occasion. Only that and nothing more, he wouldn't be operating a lottery. He might be guilty of selling a chance, which is an offense, or being in possession of a lottery ticket, which is an offense. He would be guilty of both offenses, but he wouldn't be guilty on such paucity

of evidence. The law contemplates more than one transaction, some continuity of operation, some continuation of operation, and that is what this count charges; that continuously during the period from September 24th to October 1st, he did maintain, operate and sell a lottery known as the numbers game.

It isn't necessary that the Government prove every five minutes of every day during that period of time this defendant was seen to perform some act which would constitute, if repeated successively the operation of a lottery.

Again, the rule of common sense applies. Do you believe beyond a reasonable doubt that during that period of time this defendant rather continuously, rather consistently engaged in the lottery traffic and operation. Did he consistently carry on a lottery by selling tickets and by receiving money and by possessing tickets, or either of those? I could go on, but I would be repeating myself. Simply, not one transaction or
300 two transactions, not in isolated transactions, which constitute an operation of a lottery. It constitutes a systematic operation.

That is the best I can do, Ladies and Gentlemen. I give you the case back again for your further consideration.

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301

VERDICT OF THE JURY

DEPUTY CLERK: Mr. Foreman, has the Jury agreed upon a verdict?

THE FOREMAN: We have.

DEPUTY CLERK: What say you the defendant, James Lewis, on the first count of the indictment?

THE FOREMAN: Guilty.

DEPUTY CLERK: What say you on the second count of the indictment?

THE FOREMAN: Not guilty.

DEPUTY CLERK: What say you to the defendant, James Lewis, on the third count of the indictment?

THE FOREMAN: Not guilty.

DEPUTY CLERK: What say you to the defendant, James Lewis, on the fourth count of the indictment?

THE FOREMAN: Guilty.

DEPUTY CLERK: What say you to the fifth count of the indictment?

THE FOREMAN: Guilty.

DEPUTY CLERK: Members of the Jury, your Foreman says you find the defendant, James Lewis guilty on Counts 1, 4 and 5 of the indictment, and not guilty on Counts 2 and 3 of the indictment, and that is your verdict, so say you each and all?

302

THE JURY: Yes.

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294 [Filed April 24, 1958]

On this 24th day of April, 1958, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, returns into Court at 10:30 A. M. and retires to resume their deliberation; whereupon the said jury upon their oath say that the defendant is guilty on Counts one, four, and five and not guilty on Counts two and three.

The case is referred to the Probation Officer of The Court and the defendant is permitted to remain on bond pending sentence.

By direction of

HENRY A. SCHWEINHAUT

Presiding Judge
Criminal Court #5

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297 [Filed June 9, 1958]

JUDGMENT AND COMMITMENT

On this 6th day of June, 1958, came the attorney for the government and the defendant appeared in person and by counsel, Curtis Mitchell, Esq., and Edward Molenof, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and Verdict Guilty of the offense of

Violation of District of Columbia Lottery Laws as charged in Counts One, Four and Five and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Eight (8) months to Two (2) years on Count One,
 Eight (8) months to Two (2) years on Count Four,
 and One (1) year on Count Five. Said sentence by
 the counts to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ H. A. Schweinhaut
 United States District Judge

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300 [Filed June 19, 1958]

NOTICE OF APPEAL

Name and address of appellant

James H. Lewis - 200 19th Street, S.E., Washington, D.C.

Name and address of appellant's attorney

Curtis P. Mitchell - 508 Fifth Street, N.W., Washington, D.C.

Offense Vio. T. 22-1501; 1502 & 1505

Concise statement of judgment or order, giving date, and any sentence

8 months to 2 years on Count (1)

8 months to 2 years on Count (4)

1 year on Count (5)

Said sentences to run concurrently.

Name of institution where now confined, if not on bail

Washington Asylum and Jail

I, the above named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

June 19, 1958

 [Appellant]

/s/ Curtis P. Mitchell
 Attorney for Appellant

CRIMINAL NO. 512-57

PLEADINGS AND DOCUMENTARY EVIDENCE

203

[Received Jan. 24, 1957]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)

v.)

Premises 1320 9th St., N.W.,)
(entire first floor - B&B)
Grocery & Delicatessen), Washington,)
D.C. Occupancy Permit # A 27369)
issued to Bertha M. Smith, 7/29/54.)Commissioner's Docket No. 2
Case No. 800AFFIDAVIT FOR
SEARCH WARRANT

Commissioner's Docket No. 2

Case No. 800

BEFORE James F. Splain, U.S. Court House, Washington, D.C.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) (is positive) that (on the person of) (on the premises known as) 1320 9th St. N.W., (entire first floor - the B & B Delicatessen & Grocery) Washington in the District of Columbia there is now being concealed certain property, namely lottery tickets, lottery policies or any book, paper, memorandum or device used in setting up, promoting or maintaining a policy lottery. The facts to sustain this are as set forth in the affidavit attached hereto and made a part hereof.

which are in violation of D.C. Code, Title 22, Sections 1501 and 1502.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: See the affidavit attached hereto and made a part hereof.

/s/ Samuel E. Carter, Pvt.
Morals Division, MPDC.

Sworn to before me, and subscribed in my presence, January 18, 1957.

/s/ James F. Splain
United States Commissioner

**STATEMENT OF FACTS RELATIVE TO THE REQUEST FOR
U.S. COMMISSIONER'S SEARCH AND ARREST WARRANT
FOR VIOLATIONS OF THE LOTTERY LAWS OF THE DISTRICT
OF COLUMBIA.**

SEARCH WARRANT:

1320 9th St. N.W., Washington, D. C. (entire first floor -- the
"B & B Groceries & Delicatessen), occupancy Permit #A27369,
issued July 29, 1954, to Bertha M. Smith.

ARREST WARRANT:

John Doe - Colored, male, 50-55 yrs., 5'9", 175-180 lbs., dark
complexion, yellow teeth, wears glasses at times.

Having received a complaint that numbers were being written in the
"B&B" Delicatessen, 1320 9th St., N.W., Pvt. Samuel E. Carter, Morals
Division, MPDC, was sent to make an investigation.

About 12:45 p.m., Saturday, January 12, 1957, Pvt. Carter went
to the B&B Grocery & Delicatessen, 1320 9th St. N.W. and there con-
tacted the above described John Doe who accepted the following number
bet: #756 for .25¢. John Doe wrote this bet on a plain white 3 x 5 pad and
Pvt. Carter paid him .25¢ for same. Pvt. Carter saw several other
bets on above mentioned pad. During the time Pvt. Carter was in these
premises he observed several unidentified colored men make number
bets with John Doe.

About 1:05 p.m., Monday, January 14, 1957, Pvt. Carter went to
the "B & B" Grocery & Delicatessen, 1320 9th St., N.W., and there con-
tacted John Doe and made the following number bet with him: #756 for
.25¢. At the time Pvt. Carter made this bet, John Doe and an unidentified
colored man were adding up a large quantity of number slips. John Doe
did not write this bet down and accepted .25¢ from Pvt. Carter saying
that he had the bet.

About 1:40 p.m., Tuesday, January 15, 1957, Pvt. Carter went to
the "B & B" Grocery & Delicatessen, 1320 9th St., N.W., and there con-
tacted John Doe and made the following number bet with him: #756 for
.25¢. John Doe did not write this number down, he just said, I got it,
and accepted .25¢ from Pvt. Carter. While in the store, Pvt. Carter
observed John Doe accept number bets from two other people (unidentified

colored men).

About 1:10 p.m., Wednesday, January 16, 1957, Pvt. Carter went to the B & B Grocery & Delicatessen, 1320 9th St., N.W. and there contacted John Doe and made the following number bet with him: #756 for .25¢. Pvt. Carter gave him .25¢ and John Doe did not write down the bet at this time, but about a minute later, walked behind the counter and proceeded to write something as he bent over with a yellow pencil. Just prior to making his bet, Pvt. Carter observed John Doe accept a number bet from an unidentified colored man who bet #302 for .35¢ and John Doe told him that was a cut number. Another man then entered this store and handed John Doe a one dollar bill and a slip of paper. John Doe then went behind the counter and put the one dollar bill and some change he had in his hand into a large brown paper bag.

About 1:10 p.m., Thursday, January 17, 1957, Pvt. Carter went to the B & B Grocery & Delicatessen, 1320 9th St. N.W. and there contacted John Doe and made the following number bet with him: #756 for .25¢. Pvt. Carter gave him .25¢ and John Doe wrote this number bet on a plain white 3 x 5 pad. Pvt. Carter saw several other bets written on above mentioned white pad.

The undersigned is positive that the above described John Doe is presently engaged in the numbers business which is in violation of the Lottery Laws of the District of Columbia. Further, it is the firm belief of the undersigned that there is now being concealed in premises 1320 9th St. N.W., (the B. & B Grocery & Delicatessen), lottery slips and other lottery paraphernalia in violation of the Lottery Laws of the District of Columbia.

/s/ Pvt. Samuel E. Carter
Morals Division, MPDC.

SWORN TO AND SUBSCRIBED IN
MY PRESENCE THIS 18 DAY OF
JANUARY, 1957.

/s/ James F. Splain

U. S. COMMISSIONER FOR THE DISTRICT OF COLUMBIA

SEARCH WARRANT

To The Chief of Police or any Officer of the Metropolitan Police, D.C.

Affidavit having been made before me by Pvt. Samuel E. Carter, Morals Division, MPDC. that he has reason to believe that on the premises known as 1320 9th St. N.W. (entire first floor - the B & B Grocery & Delicatessen) Washington in the District of Columbia there is now being concealed certain property, namely lottery tickets, lottery policies or any book, paper, memorandum or device used in setting up, promoting or maintaining a policy lottery. The facts to sustain this are as set forth in the affidavit attached hereto and made a part hereof.

which are in violation of D.C. Code, Title 22, Sections 1501 and 1502. and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 18 day of January, 1957.

/s/ James F. Splain

U. S. Commissioner

RETURN

I received the attached search warrant January 18, 1957, and have executed it as follows:

On January 18, 1957 at 1:10 o'clock PM, I searched the person described in the warrant and

I left a copy of the warrant with Bertha Mae Smith together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the

warrant:

\$46.15 in bills and change.

1 - numbers slip

1 - S&W revolver, serial #541749

1 - blackjack

This inventory was made in the presence of Capt. Todd O. Thoman
Bertha Mae Smith and

I swear that this Inventory is a true and detailed account of all the
property taken by me on the warrant.

/s/ Det. Gillispie B. Southcomb

Morals Division

Subscribed and sworn to and returned before me this 23 day of
January, 1957.

/s/ James F. Splain

United States Commissioner

210

[Filed March 1, 1957] COMPLAINT

UNITED STATES OF AMERICA)

v.)

John Doe - Colored, male, 50-55 yrs.,)
5'9", 175-180 lbs., dark)
Complexion, yellow teeth,)
wears glasses at times.)

512 - '57
G. J. 298 -57

COMPLAINT for VIOLATION of
D. C. CODE

Title 22
Section 1501 and 1502

Commissioner's Docket No. 2
Case No. 801

/s/ James Henry Lewis

BEFORE James F. Splain, U. S. Court House, Washington, D. C.,

The undersigned complainant being duly sworn states:

That on or about Jan. 12, 14, 15, 16, 17, 1957, at 1320 9th St. N.W. (B
& B Delicatessen), Washington in the District of Columbia above de-
scribed defendant did unlawfully set up and promote a policy lottery and
possess number slips.

And the complainant further states that he believes that
are material witnesses in relation to this charge.

/s/ Samuel C. Carter, Pvt.

Morals Division, MPDC.

(JURAT)

211 [Filed March 1, 1957]

WARRANT OF ARREST

/s/ James Henry Lewis

To The Chief of Police, D.C. or any other Officer authorized to serve same.

You are hereby commanded to arrest the above described defendant, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with unlawfully set up and promote a policy lottery and possess number slips in Washington, D. C. on January 12, 14, 15, 16, 17, 1957.
in violation of D.C.C. Title, 22, Section 1501 and 1502
Date Jan. 18, 1957.

/s/ James F. Splain

United States Commissioner

RETURN

Received January 18, 1957 at D.C., and executed by arrest of James Henry Lewis at 1322-9th St., N.W. on January 18, 1957.

/s/ Det. Gillespie B. Southcomb

Morals Division, MPDC

Date January 18, 1957

213 [Filed in Open Court May 27, 1957]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled February 28, 1957, Sworn in March 5, 1957

The United States of America)

v.)

James H. Lewis)

Criminal No. 512-'57

Grand Jury No. 298-57

Vio. 22 D.C.C. 1501, 1502
26 U.S.C. 7262

The Grand Jury Charges:

Continuously during the period from about January 11, 1957 to about January 18, 1957, within the District of Columbia, James H. Lewis was concerned as owner, agent and clerk, and in other ways, in managing,

carrying on and promoting a lottery known as the numbers game.

SECOND COUNT:

On or about January 12, 1957, within the District of Columbia, James H. Lewis sold and transferred to Samuel E. Carter a chance, right and interest in a lottery known as the numbers game.

THIRD COUNT:

On or about January 16, 1957, within the District of Columbia, James H. Lewis sold and transferred to Samuel E. Carter a chance, right and interest in a lottery known as the numbers game.

FOURTH COUNT:

On or about January 18, 1957, within the District of Columbia, James H. Lewis sold and transferred to Samuel E. Carter a chance, right and interest in a lottery known as the numbers game.

FIFTH COUNT:

On or about January 18, 1957, within the District of Columbia, James H. Lewis knowingly had in his possession and under his control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in a lottery known as the numbers game.

214 **SIXTH COUNT:**

Continuously during the period from about January 11, 1957 to about January 18, 1957, within the District of Columbia, James H. Lewis was engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411.

/s/ Oliver Gasch

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/

Foreman.

215 [Filed June 20, 1957]

PLEA OF DEFENDANT

On this 20th day of June, 1957, the defendant James H. Lewis,
 appearing in proper person and by his attorney Edward Molenof acting
 for, being arraigned in Curtis Mitchell
 open Court upon the indictment, the substance of the charge being stated
 to him, pleads not guilty thereto.
 The defendant is permitted to remain on bond.
 The deft is allowed 30 days to file motions.

By direction of

Charles F. McLaughlin
 Presiding Judge
 Criminal Court # Two

* * * * *

216 [Filed Dec. 3, 1957]

MOTION TO DISMISS

Comes now the defendant, James H. Lewis, by and through his
 attorney, Curtis P. Mitchell, and moves this Honorable Court to dismiss
 all counts subsequent to Count One of the indictment and for cause therefor
 states as follows:

1. That the counts subsequent to count one of the indictment are
 included therein and that the indictment is therefor duplicitous.

2. And for such other and further reasons to be called to the at-
 tention of the Court upon the hearing of this motion.

/s/ Curtis P. Mitchell
 Attorney for Defendant
 508 Fifth Street, N.W., Washington 1, D.C.
 Metropolitan 8-3067

(CERTIFICATE OF SERVICE)

220 [Filed Dec. 18, 1957]

MEMORANDUM

This case is before the Court upon defendant's motion to dismiss

which is predicated fundamentally upon the allegation that all counts of the indictment subsequent to Count One are duplicitous because they are included in the first count of the indictment. The Court has heard oral argument upon this motion and is of the opinion that the motion to dismiss should be denied. The counts of the indictment would be duplicitous only if the same evidence necessary to prove any one count of the indictment is identical with the evidence necessary to prove any other count of the indictment. The Court can determine this matter only upon hearing of the evidence, and accordingly, the Court will deny the motion to dismiss without prejudice to the defendant's right to renew the motion, if he considers it proper, at the termination of the Government's case.

/s/ Edward A. Tamm

J U D G E

Dated: 12/18/57.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

United States of America

v.

JAMES H. LEWIS

:
:
:
:

Criminal No. 512-57

Washington, D. C.,

Wednesday, May 21, 1958.

The above matter came on for trial before THE HONORABLE
 RICHMOND B. KEECH, Judge, and a jury, at 10:00 o'clock a.m.

For the United States:

HAROLD H. TITUS, Asst. U. S. Attorney.

For the Defendant:

CURTIS P. MITCHELL, ESQ.

- - - - -

Also present:

EDWARD W. MOLENOF, ESQ.

2

PROCEEDINGS

THE CLERK: This is the case of the United States versus
 James H. Lewis, Criminal No. 512-57.

* * * * *

MR. TITUS: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Thereupon counsel for the parties approached the bench, and
 in a low tone of voice conferred with the Court as follows:)

MR. TITUS: Your Honor, in the interest of facilitating the
 trial, I am going to move at this time to dismiss Count 6 of the indict-
 3 ment which charges the violation of the tax provisions, for the
 simple reason I don't see the representative of the Internal Revenue
 here, and we feel it would be easier to try it without that.

THE COURT: You have no objection to that, do you?

MR. MITCHELL: No, Your Honor.

THE COURT: It will be granted.

(Thereupon counsel resumed their places at the trial table, and the following proceedings were had in open court:)

OPENING STATEMENT ON BEHALF OF
THE UNITED STATES

MR. TITUS: May it please the Court, ladies and gentlemen of the jury:

As I indicated to you in the opening remarks, the defendant James H. Lewis is charged with the crimes of operating a lottery known as a numbers game in the District of Columbia from January 11th through January 18th, 1957, and with, on three occasions, selling a chance in that same lottery to an undercover officer of the Morals Division, and with the possession of numbers slips and records on the date of January 18, 1957:

* * * * *

7 When the Government has shown you these facts and shown you this defendant had numbers slips in his possession when placed under arrest, and that on the three dates I have mentioned he sold to the officer a chance in this same numbers lottery, that he was operating a lottery during this period of time which I have outlined, we will then, at the appropriate time, request you to return a verdict of guilty as indicted.

8 THE COURT: Mr. Mitchell.

MR. MITCHELL: Yes.

May we approach the bench, Your Honor?

THE COURT: Yes.

MR. MITCHELL: Thank you, Your Honor.

(Thereupon counsel for the parties approached the bench, and in a low tone of voice conferred with the Court as follows:)

MR. MITCHELL: I respectfully submit, Your Honor, that all that the prosecutor has said in his opening statement refers to Count 1 of the indictment; that Count 2 of the indictment is necessarily included in Count 1, Count 3 is necessarily included in Count 1, and that Count 4 is necessarily included in Count 1, and that Count 5 is necessarily

included in Count 1.

I therefore at this time move that the Government be compelled to elect whether it shall determine to proceed on the individual count or whether they are going to proceed on Count 1, because in the operation of a lottery, the very word "operation" itself, it has incidentally been so determined heretofore by a member of this Court, that the term "lottery operation," for lottery itself, means a continuing situation. It does not pertain, I submit, to a single transaction; that its

9 very term connotes a continuing offense:

The the Government has seen fit to allege in Count 1 that the acts complained of about which he has made his description to the jury with respect to his proof, that he operated this lottery and committed these acts within the periods set forth in Count 1 of the indictment, to wit, January 11, 1957 to January 18, 1957.

Now, Your Honor will observe that in no count contained in this indictment is laid with respect to any date or dates other than within the period that is specifically set forth in Count 1.

Your Honor may recall--

THE COURT: I saw in the file a motion before Judge Tamm.

MR. MITCHELL: Yes, and he delayed his action.

THE COURT: I don't think we have reached the point, even if I subscribe to what Judge Tamm said, where that would become appropriate. I have glanced at it already.

MR. MITCHELL: Yes, sir.

THE COURT: So I will deny your motion at this time.

MR. MITCHELL: May it be without prejudice, Your Honor?

10 THE COURT: Oh, yes. I am not going to cut you off from anything. I don't mean to imply it will be appropriate at that time, but I certainly will permit you to make a motion at that time which will protect you on the record, or which we can deal with subsequently.

MR. MITCHELL: Very well, Your Honor.

* * * * *

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EVIDENCE ON BEHALF OF THE UNITED STATES

Thereupon

SAMUEL E. CARTER

called as a witness for and by the United States, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. Now, Officer, hold your voice up loud, and tell us your full name, please. A. Samuel E. Carter.

Q. Where are you attached, Officer Carter? A. I am attached to the Gambling and Liquor Squad, Metropolitan Police Department.

Q. You are a private on the Metropolitan Police Department? A. Yes, sir.

Q. Officer Carter, I want to direct your attention to the date of January 11, 1957: Where were you assigned at that time? A. To the Gambling and Liquor Squad, Metropolitan Police Department.

13 Q. Were you working in an undercover or plain-clothes capacity? A. Yes, sir.

Q. Not in uniform? A. No, sir.

Q. Now, I want to direct your attention, Officer Carter, to the establishment known as the B & B Grocery Store at 1320 9th Street, Northwest. On that date of January 11th did you have occasion to go to that store? A. Yes, sir, I did.

Q. Will you tell the Court and the jury approximately what time of day that was? A. Approximately one p.m.

Q. When you arrived at that establishment at about one p.m., who did you see there? A. Well, I saw the defendant, James H. Lewis, seated there in the premises.

* * * * *

14 THE WITNESS: There were a number of other people in the premises.

BY MR. TITUS:

Q. You say you saw the defendant and a number of other people

in the premises? A. Yes, sir.

Q. What do the premises look like, Officer? A. Well, it is a delicatessen and grocery store. It has got a counter on the south--a long counter on the south side of the store, it has got a meat counter in the rear of the store. At that time it had a small counter toward the rear and on the north side of the store. I would say it was about 20 feet long.

Q. About 20 feet long? A. I would say it was. It could be longer.

Q. When you saw the defendant on that occasion, where was the defendant in the store when you first saw him? A. Well, he was toward the rear of the store when I first saw him.

Q. What, if anything, did you see occur while you were in the store, with regard to the defendant? A. Well, during the time I was in the store I observed the defendant being contacted by a number of people who give him slips of paper and money, or slips of paper and

15 he wrote something down, and what I interpreted to be--

MR. MITCHELL: Objection.

THE COURT: No, not what you interpreted. What you saw.

BY MR. TITUS:

Q. All right, Officer. A. Well, during the time I was in the store I observed the man to make a bet with the defendant "on 13" with a dollar.

Q. Where were you when you saw that happen? A. Near the defendant, which was near the rear of the store.

Q. Will you describe how that bet or transaction took place? A. It was on 13 dasy, and one dollar. The unidentified man paid the defendant one dollar, which the defendant put in a bag in the rear of the counter on the south side of the store and I--

Q. In the rear of the counter? A. It was behind the counter, which was located on the south side of the store.

Q. Now, you it was for No. 013. How do you know that?

A. Because I heard the man tell him he wanted to bet on 13 for \$1.00,

16 and he wrote it down on a 3 by 5 white pad.

Q. Who wrote it down? A. James Lewis.

Q. This defendant? A. Yes, sir.

Q. Officer, did you have occasion to go back to the store the next day? A. Yes, sir, I did.

Q. What, if anything, took place the next day?

THE COURT: The next day is what date, sir?

THE WITNESS: Saturday, January 12, 1957.

THE COURT: Right, sir.

BY MR. TITUS:

Q. What time did you go there on Saturday? A. About 12:45 p.m.

Q. What, if anything, occurred on that date? A. Well, I observed the defendant being contacted by a number of people who gave him slips and money, and during the time I was in the premises I had gone to the rear of the store and I had left a soda on the counter that I had opened when I came in, toward the front of the store, on a soda fountain, and I walked back by the defendant James Lewis, and was holding a quarter in my hand. He asked me, he said, "What do you want?" I stated that I didn't want anything, I was just going back to
17 get my soda.

Then I realized that I could make a numbers bet with him. I told him, I said to give me 756 for a quarter.

I said, "Give me 756."

He said, "How much?"

I said, "A quarter."

He reached for the money, I handed him the money, and he wrote the bet on a 3 by 5 white pad which had a number of other bets on it. One side was filled out with bets and he had about three bets on the right side of the pad.

The next bet prior to the bet I made was 898 for 50 cents.

Q. Where was that pad of paper when he wrote on it? A. In his hand.

Q. Did he have it in his hand at the time you had the conversation with him? A. Yes, sir.

Q. Did you see what kind of a pencil he used, or instrument, to write with? A. I believe it was a yellow lead pencil.

Q. A yellow lead pencil? A. Yes, sir.

Q. This quarter that you used for that particular bet, where had you obtained that quarter? A. From advance MP DC funds.

18 Q. Is that Metropolitan Police advance funds? A. Yes, sir.

Q. What, if anything, did the defendant do after he had written the number "756" on this pad of 3 by 5 paper? What did he do then? A. Well, he proceeded to contact people around in the premises.

Q. In the store? A. Yes, sir.

Q. Is there another store or another building adjoining that particular B & B delicatessen? A. Yes, sir.

Q. What is that called? A. It was called Jimmy's Cleaners, 1322 9th Street.

Q. And when I said "adjoining," can you get from one store to the other, inside the building? A. No, sir.

Q. Do you have to go outside? A. You have to go outside.

Q. That transaction which you have just described, I believe you testified, was January 12th. Did you have occasion to go back to the premises again? A. Yes, sir.

19 Q. What was the next occasion? A. January the 15th.

Q. Did you go back on an occasion after that, a subsequent occasion? A. January 16th.

Q. About what time was that? A. About 1:10 p.m.

Q. And on that occasion did you have any conversation or dealing with the defendant? A. Yes, sir, I did.

Q. Would you describe to the Court and jury what that was, Officer? A. I went to him and I had observed him being contacted by other people in the premises, and I had observed him to take a bet from a man, 302, for 35 cents. The man asked him, asked the defendant Lewis here were 302 a cut number, and the defendant Lewis stated that

it was a cut number.

Q. That it was a cut number? A. Yes, sir. And I went to him and told him I wanted to play my number again, 756.

He always reached for the money first. He says, "How much?"

I says, "25 cents." I paid him 25 cents, and he said, "O.K.,

20

I have it."

Q. The defendant said that? A. Yes, sir.

THE COURT: Did what?

THE WITNESS: He said, "O.K., I have got it."

Or he didn't record it down in my presence.

BY MR. TITUS:

Q. He did not record it in your presence at that time? A. No, sir.

Q. Now, you spoke of seeing on one occasion a paper bag in which you said you saw the defendant place some articles. Is that correct? A. Yes, sir.

Q. Where was that paper bag? A. Behind the counter, kind of on the left going into the store, which would be the south counter.

Q. How do you get behind that counter? A. You have to go back toward the meat counter in the back and you can go behind, and I believe immediately as you enter the door it is a soda fountain, it is a small opening, if I am correct, you can go behind that way.

Q. Did there come an occasion, Officer, when you went back to those premises after the date of the 16th that you just described?

21

A. Yes, sir. January the 17th.

Q. Did you see the defendant on that occasion? A. Yes, sir, I did.

Q. Did you have occasion to go on any date after the 17th of January? A. On January 18th.

Q. Prior to going to the store on January 18th, did anything occur at the Morals Division? A. I had obtained a United States Commissioner's arrest warrant for the defendant and a search warrant for premises 1320 9th Street, Northwest.

Q. Did you have any money with you that day? A. Yes, sir, I did.

Q. What did you have with you that day? A. Three marked dimes and one marked dollar bill.

Q. Three marked dimes and what? A. One marked \$1.00 bill.

Q. And by "marked," what do you mean, Officer? A. The dimes were tapped, a mark on them so we could identify them, and the dollar, the serial number on the dollar was recorded.

Q. By "recorded" what do you mean? A. We make a copy in the Morals--make three copies in the Morals Division of the serial
22 number on the dollar that the man who is going to play with the defendant, the dollar he is going to use, and when we find it--if we find the dollar, we match it with the serial number of the previously recorded dollar, and we can tell whether that is the same dollar, or not.

Q. Was that done that morning? A. Yes, sir, it was.

Q. About what time would you say that was, approximately?
A. Around ten a.m., I would say, or close around that time.

Q. And after that dollar bill serial number was pre-recorded, or written down, what did you do with it? A. Well, I went up to 1320 9th Street, and I made a bet with the defendant James Lewis in 1320, 756 for 30 cents.

Q. Is that the same number you played previously? A. It is the same number, but not the same amount.

Q. You played for 30 cents? A. Yes, sir.

Q. What did you use to make that particular bet? A. The three marked dimes.

Q. About what time would you say that was, Officer?

23 A. That was about 1:10 p.m.--about 1:05 p.m.

Q. What did the defendant do, if you observed him, with the three dimes that you used to make that particular play? A. Well, I thought he put it in his pocket, I am not sure, but he conferred with

another lady in the premises--a couple of the ladies, he talked with them. I didn't see him give them nothing.

Q. What did the defendant do after you made that particular bet or transaction? A. Well, a short while later he left the premises and he walked over into 1322 9th Street, which was called at that time Jimmy's Cleaners.

Q. What happened when he went to 1322 9th Street? Did you go there? A. Yes, sir. I started out behind him and the lady called me back because I had a soda bottle, I hadn't finished drinking a soda, so I went back in and took the soda back into 1320, and then I followed him into 1322. At the same time I give Private General Lee Robinson a signal, by putting my hand on top of my head, that I had made a bet with him.

On the inside of the premises I contacted the defendant again, and I told him I wanted to bet a seven for a lead. He asked me how
24 much did I want to bet, and I told him I wanted to bet a dollar, and I give him the recorded dollar, and he said, "O.K., I have it."

Q. And you want to play a seven for lead? A. Yes.

Q. What did you intend when you say that? A. Sir?

Q. What did you intend when you said "a seven for leads?"

A. The first number would be a seven. I would bet a dollar that the first number, the first digit would be a seven.

Q. And you played that for a dollar? A. Yes, sir.

Q. When you gave the pre-recorded dollar to the defendant, where were you at that time? A. In 1322 9th Street, toward the rear counter.

Q. Both of these stores you spoke of, 1320 and 1322, are they in the District of Columbia? A. Yes, sir, they are.

Q. What did the defendant do with that dollar, pre-recorded dollar, when you gave it to him? A. Well, I thought he put it into his right pants pocket. He put his hand in his coat pocket and his right
25 pants pocket. He had on an overcoat at the time.

Q. What did you do after you gave the dollar bill to the defendant

for the lead number 7? A. I remained in the premises.

Q. Did any other officers come in? A. Private Robinson came in.

Q. Did any other officers come in after Private Robinson? A. Then Sergeant William D. Foran, and Private J. B. Mills, came in a short time later.

Q. Did you remain in the premises after that? A. Yes, sir, I did.

Q. What did you see occur when the officers Foran, and Mills, and Robinson came in? A. Well, when Sergeant Foran came in I pointed out the defendant James Lewis to him as being the man that I had made the bets with, so Officer Foran advised him that he had an arrest warrant for him, and he says, "Who, for me?" And then I told him that I had made some bets with him, and I was a police officer, and he knew that I had just made some bets with him.

He says, "Well, let's see you prove where I wrote them down."

Q. Who said that? A. The defendant James Lewis.

26 Q. What happened after that, Officer? A. Well, he pulls his overcoat off and he laid it in a window.

Q. Who pulled his overcoat off? A. The defendant James Lewis pulled his overcoat off and laid it in the front window of the cleaners.

Q. What happened after that? A. Well, then Sergeant Foran proceeded to search the defendant.

Q. Did you see Officer Foran recover anything from the defendant? A. He recovered, I believe it was a 3 by 5 pad, and a slip of paper, from him.

Q. Was any search made of the overcoat in your presence? A. Yes, sir, I was in the premises when it was searched.

Q. Who searched the overcoat; do you recall? A. Private J. B. Mills.

Q. Did you see Private Mills recover anything from the overcoat? A. He recovered a pad and some bills. I don't recall just how

much money it was.

27 THE COURT: Do you mean money or paper?

THE WITNESS: He recovered a 3 by 5 pad with some number slips and some money.

THE COURT: By "bills" you mean money?

THE WITNESS: Yes, sir.

BY MR. TITUS:

Q. Were you present when the defendant's person was searched? A. Yes, sir.

Q. What happened in that regard? A. Well, the defendant was moving about, and he wouldn't stand still--

MR. MITCHELL: Objection. It is not responsive to the question asked.

MR. TITUS: I submit it is responsive, Your Honor.

THE COURT: Reframe your question and there won't be any question about it.

You did see the defendant searched?

THE WITNESS: Yes, sir.

THE COURT: What happened when he was being searched?

THE WITNESS: Well, suddenly a dollar bill appeared at his foot. I wasn't looking directly at him at the time, and Private Robinson--

28 MR. MITCHELL: I submit the answer is not responsive to the question, Your Honor. Suddenly, he says, there appeared something.

THE COURT: I asked him when it happened. Yes, I think it is directly responsive to the question.

MR. MITCHELL: Very well.

THE WITNESS: Well, suddenly I saw Private Robinson say, "There it is," and I looked down at the defendant's foot and there was a dollar bill down beside his foot.

BY MR. TITUS:

Q. Do you recall the serial number of that dollar bill? A. No,

sir, I don't.

Q. What happened after that dollar bill that you spoke of was seen at the foot of the defendant? What next occurred? A. Well, the Sergeant seized the bill and the defendant stated that we didn't get the bill off of him, we got it off the floor, and he said he had a witness to prove it, and all these people in here, they were his witnesses, and they would testify that we got the bill from the floor.

Q. How many people were in there at the time? A. Approximately, I would say, seven.

Q. I mean aside from the officers. A. About seven--six or seven.

29 Q. Did Sergeant Foran pick up or retain that dollar bill?

A. Yes, sir.

MR. TITUS: That is all as far as this officer is concerned, Your Honor.

THE COURT: Mr. Mitchell.

CROSS EXAMINATION

BY MR. MITCHELL:

* * * * *

49 Q. Now, on the 18th, sir, when the defendant Lewis left the delicatessen, you went immediately behind him; isn't that correct?

A. After I walked back in and put the soda on the box, I went in immediately behind him.

Q. So you would say he was out of your sight for how long a time, sir? A. Not long.

Q. A matter of seconds? A. Maybe a minute.

Q. Now, you said, sir, that after having gone to the tailor shop there came a time that the officers came into the tailor shop?

A. Yes, sir.

Q. And the defendant was arrested at that time? A. Yes, sir, he was standing near the door.

50 Q. Well, now, did you identify yourself to the defendant and place him under arrest? A. I identified myself to him. I pointed him

out to Sergeant Foran, and I identified myself to him.

Q. At that time, sir, you said that Officer Robinson, after there had been some search made of the clothing of the defendant, Officer Robinson said to you there was a dollar on the floor? A. He didn't say it to me. He just said it in general.

Q. Well, he said it in your presence? A. Yes, sir.

Q. And in the presence of the defendant? A. Yes, sir.

Q. You didn't see the defendant put any dollar on the floor, did you? A. No, sir, I didn't see him put it there.

Q. As a matter of fact, you put the dollar there yourself, didn't you? A. No, sir. I wasn't standing nowhere near him, wasn't even standing close to him. I know it wasn't on there previously.

Q. At the time, sir, that you say that you gave the defendant a dollar, you were standing face to face; is that correct? A. No, sir.

51 Oh, at the time I gave it to him?

Q. Yes. A. Yes, sir.

Q. How near was the next person to you, to your best recollection? A. The next person to me?

Q. There were other people in the tailor shop, weren't there? A. Yes, sir. There was some people behind the counter; there was some sitting on the shoeshine stand. There was nobody real close to me at that time.

Q. Well, what did you say? Did you say aloud to the defendant in this place what you wanted? A. In a normal tone. I told him I wanted to bet on a lead. He said, "What lead?" I said I wanted to bet on a seven, and as he always did, he reached for the money, and said, "How much?"

Q. Well, you didn't go up to him and whisper so no one else could hear? A. No, sir.

THE COURT: He said he spoke in a normal tone.

THE WITNESS: In a normal tone.

BY MR. MITCHELL:

Q. And you remained then in the premises and kept observation

52 of the defendant? A. Yes, sir.

Q. Until the other officers arrived? A. Yes, sir.

* * * * *

53 JAMES B. MILLS

called as a witness for and by the United States, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. Officer, state your full name, please? A. James B. Mills.

Q. Are you attached to the Metropolitan Police Department?

A. Gambling and Liquor Squad, yes, sir.

Q. How long have you been attached to that squad? A. It will be five years the first of July.

Q. I want to direct your attention, Officer Mills, to an establishment known as the B. & B. Grocery and Delicatessen, and
54 Jimmy's Tailors and Cleaners at 1322 9th Street Northwest. Did there come an occasion when you went to that particular store? A. I went to 1322 9th Street, yes, sir.

Q. On what date was that? A. January the 18th, 1957.

Q. Were any other officers with you at that time, Officer Mills? A. Sergeant Foran and General Lee Robinson.

* * * * *

Q. About what time did you enter those premises, Officer Mills? A. About 1:10 p.m.

Q. What, if anything, occurred at that time, Officer?

A. Sergeant Foran arrested the defendant Lewis, and searched him at that time. I searched the defendant's topcoat.

55 Q. Where was the topcoat? A. Laying in a little shelf in the window, a little platform in the front window.

Q. And when you searched the topcoat did you recover anything from it? A. I did. I recovered one numbers slip.

Q. Did you see Sergeant Foran recover anything from the defendant's person? A. No, sir, I didn't.

Q. Who else was in the store at that time? A. Several unidentified persons, Robinson, Foran and myself.

Q. When you went to this coat, had you seen the coat at the time that you entered the store, the coat that you described as a topcoat? A. No, sir.

Q. And when you-- A. I mean I didn't pay attention if I did, you know.

Q. What called your attention to that coat? A. Well, the Sergeant was searching the defendant Lewis, and I observed the coat laying in the window, and I asked him if that was his topcoat and he said yes, so I picked it up and started searching.

Q. You asked who if it was his topcoat? A. Lewis.

56 MR. TITUS: May it please the Court, may this be marked Government's 1 for identification?

THE COURT: Yes, sir.

(Thereupon a white 3 by 5 inch pad was marked Government Exhibit No. 1 for identification.)

(The exhibit was shown to defense counsel.)

BY MR. TITUS:

Q. Officer Mills, will you look at what has been marked Government's 1 for identification, and tell the Court and jury whether you have seen it before, sir? A. I have, sir.

Q. How do you identify it, sir? A. I put the date and my initials on it at the time I seized it.

Q. Where did you seize that? A. From his right overcoat pocket.

Q. The defendant's right overcoat pocket? A. Yes, sir.

Q. And did you keep that in your possession from that time? A. Until I turned it in to the Property Clerk.

Q. Police Property Clerk? A. Yes, sir.

57 Q. What else occurred while you were there on the premises on that particular day, Officer? A. Well, Sergeant Foran was searching the defendant Lewis. We were looking for marked money,

and he couldn't find it at that time, so he moved him over in the center of the floor where I was, and I asked him to unbuckle his belt, which he did, and he unzipped his pants and I shook his pants.

Q. All right, what happened at that time? A. Officer Robinson at that time picked up a dollar bill, a recorded one dollar bill, laying on the floor.

Q. When he picked up that dollar bill, what, if anything, was done with it on the premises? A. He gave it to Sergeant Foran, and Sergeant Foran checked it against the list, as the recorded one dollar bill.

Q. Was that in the presence of the defendant? A. That was, sir.

Q. Did the defendant at that time, in the store where the dollar bill was seized, make any statement with regard to that dollar bill? A. He said it didn't come from him.

Q. What occurred after that, Officer? A. Well, the bill was compared and we took the defendant down to headquarters shortly after
58 that.

MR. TITUS: Your witness.

CROSS EXAMINATION

BY MR. MITCHELL:

Q. Officer Mills, Officer Robinson called to your attention the fact that there was a dollar bill on the floor; is that correct? A. That's right, sir.

Q. So you did not mean to suggest that you saw a dollar bill fall out of this man's clothing, or anything of that sort, did you?

A. No, sir, I did not see it.

MR. MITCHELL: That's all.

REDIRECT EXAMINATION

BY MR. TITUS:

Q. How soon after you unzipped the pants and shook the pants by the waistband did Officer Robinson call out to you that there was a dollar bill? A. Immediately.

MR. TITUS: That's all.

THE COURT: You may step down.

(The witness left the stand.)

* * * * *

59

GENERAL LEE ROBINSON

called as a witness for and by the United States, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. State your full name, please, Officer? A. Private General Lee Robinson.

Q. Are you an officer of the Metropolitan Police Department?
A. I am.

Q. Where are you attached at the present time? A. The Fifth Precinct.

Q. On the date of January 18th, 1957, where were you attached?
A. I was attached to the Morals Division.

Q. Specifically, Officer Robinson, directing your attention to the address 1322 9th Street, Northwest, did there come an occasion in the month of January when you went to that address? A. Yes, there did.

Q. On what day was that, sir? A. That was the 18th of January, 1957.

Q. Tell the Court and the jury what occurred on that occasion,
60 Officer? A. On that occasion, about 1:10 p.m., I received a signal from Officer Carter, at which time I was on the east side of 9th Street in the 1300 block, at which time I walked across the street to the west side and signaled Officer Foran.

Q. What did you then do? A. I waited outside the premises at the doorway until Sergeant Foran came up, and then I went inside the premises.

Q. When you went in the premises, who did you see? A. I saw Officer Carter, and there was several other persons, including the

defendant.

Q. Including the defendant? A. Yes, sir.

Q. What, if anything, transpired with regard to the defendant Lewis when you went inside the premises on that occasion? A. Officer Carter pointed to Mr. Lewis and Officer Carter had a conversation with Officer Foran.

Q. Where were you at that time? A. I was in the premises at the time.

Q. Where you near the defendant at that time, when the conversation took place? A. I was.

61 Q. What else happened after that? A. Sergeant Foran informed the defendant that he had a warrant for his arrest, and started searching the defendant at that time.

Q. Started searching the defendant? A. Yes, sir.

Q. What did you do on that occasion? A. Well, I was just standing in the premises near the doorway.

Q. What happened after Sergeant Foran started to search the defendant? A. Well, after Foran had finished searching him, Officer Mills pointed on the floor and informed me there was a dollar bill on the floor near the defendant, at which time I recovered it and gave it to Sergeant Foran.

Q. Where was the dollar bill on the floor? A. It was on the floor near the defendant's right foot.

Q. Near the defendant's right foot? A. Yes, sir.

MR. TITUS: Your witness.

* * * * *

63

WILLIAM D. FORAN

called as a witness for and by the United States, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. State your name, please, Officer. A. Sergeant William D.

Foran, assigned to the Gambling and Liquor Squad, Morals Division, Metropolitan Police Department.

* * * * *

63-A Q. Were you in charge of the investigation of this particular case involving the premises at 1320 and 1322 9th Street, Northwest, in the District of Columbia? A. I was, sir.

Q. Specifically, Sergeant, did there come an occasion when you went to either one of those two premises? A. I did, sir.

Q. On what date was that, sir? A. On January 18, 1957, about 1:10 p.m.

Q. What premises did you go to, sir? A. I went to premises 1322 9th Street, Northwest, which is a cleaning establishment.

* * * * *

64 Q. Now, describe to the Court and jury what you did and what took place when you entered the premises? A. I followed Private Robinson into 1322 9th Street, Northwest, and as I entered the door the defendant Lewis was coming toward the door. Private Carter pointed to identify Lewis as the man for whom we had an arrest warrant. I identified myself by exhibiting my badge and notified Lewis that he was under arrest for writing numbers.

He says, "Who, me?"

I said, "Yes, you have been taking numbers bets from a police officer."

He says, "Not me."

I then placed Lewis over against the north wall west of the entrance to the establishment, and started to search him. I had taken a large quantity of bills from his left front trouser pocket and had started to examine them to look for a marked bill--

65 Q. Now, by "bills" what do you refer to? A. Money.

Q. Were they dollar bills? A. There were various denominations.

Q. What was the total amount; do you remember-- A. Five hundred--

MR. MITCHELL: Objection; immaterial.

THE COURT: I will let him answer it.

BY MR. TITUS:

Q. What was the amount? A. \$523.25.

Q. From the left front? A. Left front trouser pocket of the defendant.

Q. What happened after that? A. As I started to examine these bills, Lewis removed his overcoat and laid it in the show window of the establishment. I instructed Officer Mills to examine the coat, which he did. I then put Lewis back against the wall and started to compare the money again. He kept moving around. And while I was comparing this money Lewis put his right hand in his right front trouser pocket and moved his hand back around inside his jacket in the area of the top of his trousers, in the rear over his right pocket.

66 I told Lewis at that time to remain still and quit putting his hands in his pockets.

After I had completed checking the money that I had taken from the left pocket for the marked bill, I then ran my fingers around the waistband of Lewis' trousers and I didn't feel anything. So then I had Lewis move from the north wall over to a position in front of a counter which is in this premises, and instructed Officer Mills to open up the defendant's trousers and see if the bill was in his trousers.

Q. Now, let me interrupt you there, Officer, and ask you: At the time that you had the defendant moved to this different locality, did you observe whether there was anything on the floor? A. Yes. There was nothing on the floor at the time that he was moved over there, and he and Officer Mills and myself, and Private Robinson, were in the immediate area where he was standing, where I had him placed for the examination.

Q. What did Officer Mills then do? A. Officer Mills unbuckled the defendant's belt, and the defendant unzipped his pants. Officer Mills then shook the trousers by the waistband and the defendant was permitted to secure his trousers again.

About this time Officer Robinson says, "There's the money."

67 Officer Robinson reached down alongside the right foot of the defendant and picked up a crumpled one dollar bill.

He handed the bill to me, and I then told the defendant to come over here and let me compare the serial number on the bill with the records that I had made of the marked money.

Q. When had you made those records? A. In the office of the Morals Division, in the morning of January the 18th.

Q. And how had you made the record of the bill? A. We had marked three dimes and a one dollar bill, and recorded the serial number of this bill--

Q. Where had you recorded the serial number of the bill?
A. On a piece of paper that we had used to make the record of the marked money

MR. TITUS: May it please the Court, may this be marked Government's Exhibit No. 2 for identification?

THE COURT: Yes, sir.

(Thereupon a one-dollar bill was marked Government Exhibit No. 2 for identification.)

(Exhibit No. 2 was shown to defense counsel.)

68 BY MR. TITUS:

Q. Officer, will you look at what has been marked Government's Exhibit 2, the contents, a dollar bill, and tell us whether you recognize that? A. Yes. This is the one-dollar bill that I had recorded the serial number of in the office of the Morals Division about 10:55 a.m. on Friday, January the 18th.

Q. How do you recognize it, Sergeant? A. By the serial number on the bill.

Q. When that bill was picked up, as you have described it, from the floor, what did you do with the bill at that time? A. I instructed the defendant to come over and let me compare the serial number with the record, and the defendant, he started shouting, "You

didn't get it off of me; I have witnesses," and he pointed to several persons who were standing up in the front of the place; and I couldn't get him over to let me compare the numbers visually. I then read the numbers out loud so he could hear them.

Q. That is, the number, the serial number? A. The serial number on the bill with the record that I have here.

MR. TITUS: If the Court please, may the contents of this envelope be marked as Government's Exhibit No. 3 for identification?

69 THE COURT: Yes, sir.

(Thereupon envelope with contents writing pad, etc., was marked Government's Exhibit No. 3 for identification.)

(Government's Exhibit No. 3 was shown to defense counsel.)

BY MR. TITUS:

Q. Sergeant Foran, will you look at the contents of this envelope marked Government's 3 for identification, and tell the Court and jury whether you recognize any of those? A. Yes. This 3 by 5 pad I seized from the left jacket pocket of defendant Lewis.

Q. What does that pad have on it, sir, if anything? A. This has--

MR. MITCHELL: Objection, Your Honor.

THE COURT: It will speak for itself.

MR. TITUS: Very well, Your Honor.

BY MR. TITUS:

Q. What is the other thing? A. This piece of paper here I seized from the shirt pocket of the defendant.

Q. What about the pencil? There is a pencil in there, is there?
A. I haven't marked that for identification.

Q. Was there a pencil, if you know, seized from this defendant?
A. I do not recall, sir.

* * * * *

71 MR. TITUS: If the Court please, I think the witness is qualified as an expert.

THE COURT: Any preliminary questions, Mr. Mitchell?

MR. MITCHELL: I have none.

THE COURT: All right, sir.

You may proceed.

MR. TITUS: The Court will recognize the witness as an expert?

THE COURT: Yes, sir.

BY MR. TITUS:

Q. Look at Government's Exhibit 1 for identification, that 3 by 5 pad, the numbers appearing on the pad, and tell the Court and the jury, if you will, what they represent to you, sir? A. On the first sheet of this 3 by 5 pad I find eight numbers bets recorded thereon.

MR. MITCHELL: Objection, Your Honor.

THE COURT: You find eight numbers which you recognize in your opinion as what, sir?

THE WITNESS: As numbers bets.

* * * * *

[BY MR. TITUS:]

Q. I want you to look at what is marked as Government's Exhibit No. 3, Sergeant, for identification, and tell the Court and the jury what in your opinion those pieces of paper represent? A. On this 3 by 5 pad here which I removed from the defendant's left jacket pocket, and I identify it by my initials and the date and time on there, we have here 287 dash 12 zero. To me that indicates a bet on No. 287 for \$1.20. It also has written on there an abbreviation, Friday, "F-R-I."

Q. Will you look at the other piece of paper before you?

A. Now, this piece of paper is the piece of paper that I took from the defendant's shirt pocket, and on here we have several numbers bets recorded. The first is 779 for a combination, 3 cent combination.

Now, 779 is what is referred to as a three-way combination. There is a six-way combination and a three-way combination. So where you have a bet with the same two numerals in the series, why, then, it is a three-way combination.

Next we have 773 for 3 cent combination.

Then we have 88 zero for a five-cent combination.

Then we have 908 for a 3 cent combination.

642, five cents.

246 for 5 cents.

991 for 5 cents.

* * * *

78

CROSS EXAMINATION

BY MR. MITCHELL:

* * *

85

Q. Now, you went through the change that the defendant had, did you not? A. Yes, sir.

Q. Well, you were looking for certain dimes that you had marked, weren't you? A. That's correct.

* Q. Did you find any? A. No, sir.

* * *

94

Q. Now, if I were just to write some numbers as these are written down on a piece of paper, sir, and one of them happened to be the winning number for the day, but I neglected to pay or put them in with the writer, would I be able to receive a price for that? A. If you hadn't entered into a contract, either by paying when you played, or by playing on credit, if you had never made the bet with the writer, you wouldn't get paid, no, sir.

Q. So therefore, sir, it becomes a numbers slip when it gets into the stream of the operation, when I have either promised to pay the writer or I paid the writer for my chance; is that correct, sir?

A. That's my interpretation of it.

Q. And I believe I understood you to say you are not in a position to say that any of these things that you have identified as having numerals on them have ever entered the stream of the operation of a lottery? A. I said that, sir.

* * *

97

Q. You don't know how old any of these are? A. I do not.

Q. You had no carbon paper? A. No, sir.

* * *

98

MR. TITUS: Your Honor, at this time the Government will

renew its offer of Exhibits 1, 2 and 3.

THE COURT: Nos. 1, 2 and 3 will be received.

MR. MITCHELL: May I be heard?

THE COURT: Yes. Come to the bench.

(Thereupon counsel for the parties approached the bench, and in a low tone of voice conferred with the Court as follows:)

MR. MITCHELL: Your Honor, I do object, and my reason for it is this:

THE COURT: You object to which one?

MR. MITCHELL: To the exhibits with the exception of the money.

99 THE COURT: All three--wait a minute. Which ones do you object to?

MR. MITCHELL: I am objecting to these pieces of paper.

THE COURT: That is No. 1.

MR. MITCHELL: Yes, sir.

THE COURT: All right, sir.

MR. MITCHELL: And No. 3, Your Honor.

THE COURT: No. 3; all right, sir.

Do you want to state your objection?

MR. MITCHELL: No objection to No. 2. That is the dollar. I don't know what it is.

MR. TITUS: No. 2 is the dollar, I believe.

MR. MITCHELL: Your Honor is correct about that.

I would rather direct my objection, first--

THE COURT: Let me get it straight, because I want to know where I stand. You do object to 1, and you do object to 3, but you have no objection to 2; is that right?

MR. MITCHELL: A qualified objection, if Your Honor please.

THE COURT: All right, go ahead.

MR. MITCHELL: 1 and 3; The witness just testified that he is not in position to say that either of those two exhibits constitutes a numbers slip, because he cannot say that they have been in the stream

100 of operation of a lottery. I think I specifically asked him that question.

THE COURT: Yes, I think you did.

MR. MITCHELL: Now, with respect to the dollar, if Your Honor please:--

THE COURT: He wouldn't have personal knowledge or couldn't have personal knowledge of that, but isn't that a matter of circumstances? Wouldn't it have to be?

MR. MITCHELL: You have got Count 5, which specifically charges, Your Honor, that that is numbers paraphernalia, so I don't think that could be.

THE COURT: He has stated in his opinion it is numbers paraphernalia. You objected to him concluding it was, and he qualified it and he said in his opinion it was.

All right, sir; anything else?

MR. MITCHELL: About the dollar, there is no-- well, of course, I guess the witness Carter said he gave him the dollar. I think that knocks me out.

THE COURT: So I will receive the three, subject to the objection which you made as to 1 and 3.

MR. MITCHELL: Yes, sir.

101 (Thereupon counsel resumed their places at the trial table, and the following proceedings were had in open court:)

(Government's Exhibits Nos. 1, 2 and 3, previously identified, were received in evidence.)

MR. TITUS: We rest, Your Honor.

THE COURT: All right, Sergeant, you are excused.

(The witness left the stand.)

MR. MITCHELL: I am sorry to worry Your Honor again. I think we have to come back.

THE COURT: Come back.

(Thereupon counsel for the parties approached the bench, and in a low tone of voice conferred with the Court as follows)

MR. MITCHELL: I think in view of the evidence I am at the point where I should renew the motion that I made with respect to the duplicity. I claimed that the indictment is duplicitous. I claimed that the same evidence that he is depending on with respect to the several counts is necessarily encompassed within the area of Count 1.

Now, if Your Honor please, I think under the Code, 22-1501, no single act--I think when you use the word "operation," a single act does not in my opinion constitute the violation that is contemplated by
 102 the statute. As a matter of fact, Judge Schweinhaut just so ruled, only about a month ago, in a case in which he instructed the jury that very way, that one or two acts would not constitute a violation of it because the operation in and of itself means more than a single act. I think operation of a lottery is more than a single act. But even if it contemplated a single act, the Government has chosen by its own calculation to necessarily include, when they say from the 11th to the 18th, they have thereby included only the other so-called substantive acts, the specific acts which they have designated in the indictment. I don't believe that they can do that. I believe that under those circumstances they are bound, therefore, to elect, because this is a blunderbus, it seems to me a blunderbus attack. You charge the man actually in Count 1 with committing the same offenses that you are charging him with in 2, 3, 4 and 5. The Act itself sets up the several different means by which the statute may be violated, but does not indicate that each type of violation constitutes a separate offense. In other words, I say if I operate the lottery I can operate it in the several ways that
 103 the statute indicates that the statute may be violated. I still only committed one offense, by being the agent, owner, and so forth, if I am only those things. Suppose I served in all those capacities, I could not be prosecuted for being the agent, also prosecuted for being the clerk, also prosecuted for being the owner. It occurs to me that I can be prosecuted only once, although I have committed all those acts.

May I, with Your Honor's leave, I will demonstrate what I have reference to by the statute:

It says if any person shall within the District keep, set up or promote or be concerned as owner, agent or clerk or in any other manner.

Now, there is no way in the world, there is nothing I can do that would make me subject to this, this managing, carrying on, promoting, advertising, directly or indirectly, any policy lottery, or shall sell or transfer any chance, right or interest, tangible or intangible, in any policy lottery or any lottery, or shall sell or transfer any deeds, certificates, bills.

Now, those are the ways in which the statute can be violated.

In order to maintain the position of the Government, each one of these would have to be disjunctive in the sense that it would constitute a separate and distinct crime.

I say there is one violation of the statute and only one criminal proceeding can be had, Your Honor.

THE COURT: All right, sir. You are moving now for what, sir?

MR. MITCHELL: I am now asking Your Honor to do one of two things:

Either to compel the Government at this time to elect or in the alternative I am asking Your Honor to direct a verdict as to Counts 2, 3, 4 and 5, which I have indicated to the Court are necessarily included within the scope of Count 1.

THE COURT: I will deny those two motions, Mr. Mitchell.

* * * * *

[JAMES HENRY LEWIS
CROSS EXAMINATION]

121 BY MR. TITUS:

Q. No. 3, this piece of paper, with numbers on it, do you recognize that? A. I do.

Q. What is that? A. That is numbers put down on a piece of paper.

Q. Who put them there? A. I did.

* * * * *

122 Q. You put them on in the basement when you were writing?

A. Yes, I write them, sometimes leave them laying around there, sometimes I put them in my pocket. I might play them, I might not.

* * * * *

Q. Where did you have those when you were arrested?

A. These were in my shirt pockets.

Q. Shirt pockets? A. That's correct.

Q. Do you carry them in your shirt pocket, as a rule? A. I do, if I am going to play them, I might carry them. If I don't, I leave them home.

* * * * *

123 Q. How many of those were you going to play? A. I said I didn't know whether I would play any of them. I might not have played any of them that day.

* * * * *

Q. That you might play? A. That's correct.

Q. Did you decide the prices you might play on some numbers in advance? A. I do that. All the numbers players do that.

124 Q. All what? A. All numbers players decide what they are going to play on them.

Q. Are you a numbers player? A. I am.

* * * * *

152 MR. MITCHELL: That is our case.

THE COURT: Does the Government have any rebuttal?

MR. TITUS: No, Your Honor.

THE COURT: Suppose you come to the bench.

(Thereupon counsel for the parties approached the bench, and in a low tone of voice conferred with the Court as follows:)

* * * * *

THE COURT: Anybody any particular prayers?

MR. TITUS: No, just the usual ones, Your Honor.

MR. MITCHELL: The first one, I have to renew all my

objections and the motion.

THE COURT: You want to reserve the motion, and for the reasons stated, and that will record them here as though they had been made, and talked to me here.

153 MR. MITCHELL: Yes. I would make this suggestion to Your Honor: I think consistent with the instruction that Judge Schweinhaut gave, and that is this:

I think that before the jury could find the defendant guilty on Count 1 of the indictment that there would have to be a showing over and beyond just merely two or three isolated situations that everybody testified to, and my basis for that is that--

THE COURT: Your mathematics are not very good to begin with, when you say two or three, but in any event I will give them my regular charge, which I think you are familiar with, as to a lottery. And have you got written out what Judge Schweinhaut has? If you have I will take it, or I will give them my regular one.

MR. MITCHELL: No, I don't have it.

* * * * *

177 JUDGE'S CHARGE TO THE JURY

THE COURT: Ladies and gentlemen, you will soon have for your determination the guilt or innocence of the defendant who stands before you charged in a six-count indictment with certain alleged violations of gambling laws of the District of Columbia. The indictment is in six counts. You will, however, have for your consideration only the first five counts. The sixth count has been dismissed. So you have five counts for your consideration.

By now you know it is the duty of the Court to instruct you as to the law of the case, namely, the rules and principles applicable to the particular case on trial, and that you are bound and obligated to follow those rules and principles.

On the other hand, you ladies and gentlemen are the sole judges of the facts, and it is for you to determine all issues of fact from the testimony adduced from the witness stand, and reasonable

inferences to be deduced from proven facts and in conformity with your recollection of the facts.

Counsel for the Government and defense counsel have the right to make opening statements indicating what they hope they may be able to show for their respective sides and at the conclusion of the case to sum up, as we say, indicating what they believe they have in fact been able to show for their respective sides.

178 Statements by both counsel or either counsel do not constitute evidence in the case. If your recollection be at variance with the recollection of Government counsel or defense counsel, or for that matter the Court's recollection, as to any fact or matter you will ignore it, because you are the sole judges of the facts, and it will be your recollection which will control.

The mere fact that a defendant has been indicted as indicated by the document which I display to you is not to be construed as evidence in the case. It is not. The sole purpose of the indictment is to advise the defendant of the charge or charges which he must face when the case comes on for trial. It is not evidence.

Every defendant in a criminal case is presumed to be innocent. This presumption of innocence attaches to the defendant throughout the trial. The burden is on the Government to prove a defendant guilty beyond a reasonable doubt, and if the Government fails to sustain this burden, then you must find the defendant not guilty.

You may not speculate or conjecture as to his guilt but you may draw all reasonable inferences from the facts which are proved.

You may well ask what is meant by the phrase, "a reasonable doubt." It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty, and not necessarily proof

179 to an absolute or mathematical certainty. It is doubt which is reasonable in view of all the evidence, and not merely some arbitrary or capricious determination. It is a doubt which is reasonable in view of all the evidence. Therefore, if after an impartial comparison and consideration of all the evidence, you can truthfully say that you are not

satisfied with the defendant's guilt, then you have a reasonable doubt. But if after such impartial comparison and consideration of all the evidence, and when you have given due consideration to the presumption of innocence which attaches to a defendant, you can candidly say that you are satisfied in the same manner in which you would be satisfied in the more weighty and important matters of your own private life, then you have no reasonable doubt.

There are two kinds of evidence which come into play in the affairs of life, and also in the trial of cases. One is known as direct evidence, the other is known as indirect or circumstantial evidence. Direct evidence is the testimony of witnesses that he saw such and such a thing or that he heard such and such a thing. Indirect or circumstantial evidence is evidence which is deduced from proven facts which in the natural course of events shows cause and effect. In other words, circumstantial evidence flows from proven facts.

180 For instance, an example that may be homely, but a vivid one is the question of the snow, an animal's track in the snow. If you see an animal's track in the snow, a rabbit's track, for instance, you know just as well that a rabbit has been there as if in fact you saw the rabbit. But the rule of law is that before--

I should say first to you, both types of evidence have been introduced in this case. Both types of evidence are admissible in this case.

Sometimes circumstantial evidence may be stronger than direct evidence. But whether the evidence be direct or circumstantial or a combination of the two, before you may find a defendant guilty, you must find that that evidence, singly or in combination, adds up to proof beyond a reasonable doubt.

I have already said to you that you are the sole judges of the facts. So too are you the sole judges of the credibility of the various witnesses who appear before you. In determining whether to believe the testimony of any witness and in weighing his testimony, you may consider his demeanor on the stand, his manner of testifying, whether

he impresses you as having an accurate memory and recollection, whether he impresses you as a truth-telling individual, his apparent
181 candor and fairness or lack of it, the interest which he has in the result of the trial of the case, if any, his bias and prejudice for or against the defendant, if any be shown, and his opportunities of knowing the facts and circumstances about which he has testified, and then from all these facts and circumstances it becomes your duty to give the proper weight to the testimony of each and every witness who has appeared before you.

And you are further instructed that while the law makes the defendant a competent witness in this case, yet you have the right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony such weight as in your judgment it is fairly entitled to.

I have already said to you the defendant here is charged in a six-count indictment, but you are merely concerned with the first five counts thereof.

Now, Count 1 charges that the defendant during the period from about January 11, 1957, to about January 18, 1957, within the District of Columbia, was concerned as owner, agent and clerk and in other ways in managing, carrying on and promoting a lottery known as a numbers game.

Counts 2, 3 and 4 charge that the same defendant sold chances in a numbers game to one Samuel E. Carter within the District of
182 Columbia on the date specified in the indictment.

Count 5 charges the defendant with knowingly having in his possession and under his control on January 18th, 1957, notations, records, receipts, tickets, and other papers, current and not current, used in the numbers game.

This indictment will be given to you.

I have not attempted to give you the detail of the indictment for the reason which I have just stated.

Now, Count 1 of the indictment is based on the following

provision of the D.C. Code of laws, and insofar as pertinent to your inquiry, I will read it to you:

"If any person shall within the District of Columbia keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, he shall be punished as provided by the statute."

In the eyes of the law a lottery is the awarding of a prize by chance. The exact method adopted for the application of chance to the distribution of the prizes is immaterial.

In the eyes of the law, the so-called numbers game is a lottery.

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And the law goes further, to provide as follows:

"The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery."

So if you should find that this defendant had in his possession numbers slips, that is sufficient upon which to base a finding that the defendant was guilty of the charge as set forth in Count 1, unless his possession of the slips is otherwise explained to your satisfaction.

The next three counts, Counts 2, 3 and 4, charge the same defendant with selling and transferring to Samuel E. Carter a chance, right, or interest in a lottery known as the numbers game. The statute in so far as pertinent to these counts reads:

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"If any person shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or

assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, ~~or shall~~, for himself or for another person, sell or transfer a chance or ticket in any lottery or any such bill, certificate, token, or other device, shall be punished as provided by the statute."

I have already told you that the numbers game, so-called is a lottery in the eyes of the law. You will note that the statute punishes the sale or transfer of any chance, right or interest in a lottery, whether it is tangible or intangible. Therefore it is immaterial whether in making the sale or transfer of a numbers chance the purchaser receives a receipt or does not receive a receipt or paper of any kind.

You will note further that these counts, Counts 2, 3 and 4, unlike Count 1, do require proof of a sale or transfer of a numbers chance.

Now, as to Count 5, the pertinent statute relating to that count reads:

185 "If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of the law, he shall be punished as provided by the statute."

And the statute goes further and recites:

"For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or other writing shall be presumed to be knowing possession thereof."

In other words, under this statute, it is a criminal offense for a person to have in his possession any ticket or slip or writing used for the purpose of playing or conducting any lottery, current or not current, provided a person knew he had such slip in his possession, and that he knew the slip or paper or writings were used for the purpose of carrying on the numbers game.

Now, knowledge, of course, cannot be proved directly. Science has not invented an X-ray by which the operations of the human mind can be photographed. Knowledge can be deduced from circumstances. It can be inferred from things done and things said by the person, and from the surrounding circumstances. It is a question to
186 be determined by the jury on all the facts surrounding the possession of the slips.

In connection with this statute, it is specifically provided that where possession of writings used or to be used in violating the lottery laws of the District of Columbia has been proved, the jury may infer from that fact that such possession was knowing possession, unless the possession is shown to the jurors' satisfaction to have been without the defendant's knowledge; and you are instructed as a matter of law that possession means not merely actual physical possession, but includes constructive possession as well.

Constructive possession occurs where a person does not have within his hands or grasp the article in question but does have dominion and control over it.

If you find that the Government has proved as to each of the counts each of the essential elements enumerated, and in the manner stated to you by my previous instructions, you may find a defendant guilty as to such count or counts.

If you find as to any one or all of the counts that the Government has failed to prove beyond a reasonable doubt and in the manner specified, then you must find the defendant not guilty as to such count or counts.

Counsel has stated to you, and properly so, that this matter is,
187 of course, important to all concerned. When you go to the jury room you will consider the case deliberately and carefully, dispassionately and objectively, without bias or prejudice for or against the defendant, without emotion, and without sympathy, and in the light of the instruction on the law which I have given you, bearing in mind that you, the jury, are the sole judges of the facts.

Your verdict in this case will be guilty or not guilty as to Count 1, guilty or not guilty as to Count 2, guilty or not guilty as to Count 3, guilty or not guilty as to Count 4, guilty or not guilty as to Count 5.

Your verdict may be guilty as to all five counts, not guilty as to all five counts, or a combination of guilty and innocent.

Has either counsel anything to add?

MR. MITCHELL: If you please, Your Honor.

(Thereupon counsel for the parties approached the bench, and in a low tone of voice conferred with the Court as follows:)

MR. MITCHELL: Two things, if Your Honor please:

First, Your Honor, I respectfully object to the instruction Your Honor gave to the jury on the prima facie case on the presumption.

188 THE COURT: In what particular, sir?

MR. MITCHELL: Your Honor told them about the Code, that possession would establish a prima facie case.

THE COURT: I read the statute.

MR. MITCHELL: Yes, sir. I object to it.

THE COURT: All right, sir.

What I am asking you, seriously, I did read it accurately, as far as you know?

MR. MITCHELL: Yes, sir.

THE COURT: All right. I just wanted to see if I had slipped. All right, sir.

MR. MITCHELL: Secondly, I think that, assuming the correctness of the presumption, if Your Honor please, that Your Honor should instruct the jury before they engage in the presumption at all, they have got to first find that the pieces of paper that he had in his possession constituted numbers slips. You recall the testimony of Sergeant Foran and the testimony of the defendant. The defendant testified that these pieces of paper, the numerals on there, merely indicated some things which he didn't even know whether he was going to play or not, something that he had written himself.

189 Sergeant Foran testified that before it could be a numbers slip it would have to enter into the stream of the numbers operation.

And my contention is that there is no evidence showing that it ever had entered into the stream of operation.

The jury, therefore, must first be told that before they can engage in the presumption predicated on possession, they must first find that the pieces of paper do in fact constitute numbers slips.

THE COURT: I said this, Mr. Mitchell:

After giving the statute, and some other things, if you should find that the defendant had in his possession numbers slips, that is sufficient evidence upon which to base a finding that the defendant is guilty of the charge in Count 1, unless his possession of the slips is otherwise explained to your satisfaction.

MR. MITCHELL: That is the reason I call it to your attention, because I think that presupposes that the things are numbers slips, and then the duty or obligation on the defendant to explain his possession of them.

THE COURT: Well, I think that is what the statute says.

190 MR. MITCHELL: That is what I am arguing against.

THE COURT: All right, you are arguing against the statute.

MR. MITCHELL: Because I say in this case they have got to first find that they are in fact numbers slips before they may engage in that.

THE COURT: I have said that--I think I have said that, and then I tried to accurately quote the statute.

MR. MITCHELL: All right.

THE COURT: For your protection you want to renew what you have heretofore done.

MR. MITCHELL: Yes.

THE COURT: All right, sir.

* * * * *

192 (At 6:05 p.m., the jury was called into the courtroom by the Court:)

THE COURT: Counsel, come to the bench a minute.

(Thereupon counsel for the parties approached the bench and conferred with the Court as follows:)

THE COURT: I thought I would first say to the jury I don't want to know how they stand but I think I will ask them whether they have reached a verdict as to any count, and if they say they haven't, I will do what I say.

(Thereupon counsel resumed their places at the trial table, and the following proceedings were had in open court:)

THE COURT: Ladies and gentlemen, may I first say to you, please, I do not desire to know how you stand, so please don't state how you stand. I will first ask you, have you reached a verdict as to any count?

A JUROR: Yes.

THE COURT: Well, the Clerk will take the verdict as to those counts as to which there has been an agreement.

THE CLERK: Madam Foreman, what say you as to the defendant James H. Lewis on the first count of the indictment?

193 THE FOREMAN: Guilty.

THE CLERK: What say you as to the second count of the indictment?

THE FOREMAN: Guilty.

THE CLERK: On the second count, what say you?

THE FOREMAN: Guilty.

THE CLERK: What say you as to the third count of the indictment?

THE FOREMAN: Guilty.

THE CLERK: What say you as to the fourth count of the indictment?

THE FOREMAN: That was not decided.

THE COURT: No verdict.

THE CLERK: What say you--

THE COURT: Excuse me. I didn't hear you.

THE FOREMAN: We have not decided.

THE CLERK: What say you as to the fifth count of the indictment?

THE FOREMAN: Guilty.

THE CLERK: Members of the jury, your forelady says that you find the defendant guilty on the first count of the indictment, guilty on the second count of the indictment, guilty on the third count of the indictment; no decision as to the fourth count of the indictment, and guilty as to the fifth count of the indictment, and that is your verdict
194 as of now, so say you each and all.

(All jurors nodded their affirmation.)

MR. TITUS: May we approach the bench, Your Honor?

THE COURT: Yes.

(Thereupon counsel for the parties approached the bench, and out of the hearing of the jury, conferred with the Court as follows:)

MR. TITUS: If the Court will agree, the Government will move to dismiss the counts that the jury has not agreed upon at this time.

MR. MITCHELL: I don't guess I can object.

THE COURT: I didn't think you would either.

I will state that, and then dismiss this jury.

MR. TITUS: Yes, sir.

(Thereupon counsel resumed their places at the trial table:)

THE COURT: Ladies and gentlemen, the Government has moved for a dismissal as to the counts on which there has been no decision, and the Court will grant that motion, and you are therefore excused, to return to this court at 9:45.

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[Filed May 21, 1958]

On this 21st day of May, 1958, came the attorney of the United States; the defendant in proper person and by his attorneys Curtis P. Mitchell and Edward Molenof, Esquire; whereupon the jurors of the regular Petit Jury panel serving in Criminal Court No. Two, being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

- | | |
|-----------------------|--------------------------|
| 1. George H. Pixton | 7. Fleming W. Brown, Jr. |
| 2. James B. Ahern | 8. Liza Shipp |
| 3. Herman C. Mitchell | 9. Jefferson H. Clark |
| 4. Columbus B. Ware | 10. Francis J. Custer |
| 5. Bettie T. Lyles | 11. Dewey D. Dillion |
| 6. Gladys B. Williams | 12. James J. Glennon |

who are sworn to well and truly try the issue joined herein; whereupon, the Court directs the calling of two alternate jurors and Laura M. Zirkle and Robert L. Twitty being called, are sworn as alternate jurors #1 and #2 respectively, whereupon, after hearing evidence in the case, arguments of counsel and the Charge of the Court the alternate jurors are discharged and the jury retires to consider its verdict. Whereupon, the jury returns into Court and upon their oath say that they find the defendant Guilty on Counts #1, #2, #3 and #5 of the indictment; whereupon, the oral motion of the Government to dismiss Count #4 of the indictment is by the Court granted. The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction of
Richmond B. Keech
Presiding Judge
Criminal Court #2

Present:

United States Attorney

By Harold H. Titus

Assistant United States Attorney

R. Frye & M. A. Deeds

Official Reporter

HARRY M. HULL, Clerk

By /s/ Lloyd E. Dutuch

Deputy Clerk

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[Filed June 30, 1958]

Judgment and Commitment

On this 27th day of June, 1958 came the attorney for the government and the defendant appeared in person and by counsel, Curtis P. Mitchell, Esquire and Edward Molenof, Esquire

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Violation of Title 22 Section 1501 and Title 22

Section 1502 of the District of Columbia Code

as charged counts #1, #2, #3 and #5 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

One (1) year to Three (3) years on counts #1, #2, and #3;

One (1) year on count #5; said sentences to run concurrently; said sentence to take effect at the expiration of sentence imposed in Criminal Case No. 1156-57

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ R. B. Keech

United States District Judge

* * * * *

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[Filed June 30, 1958]

NOTICE OF APPEAL

Name and address of appellant

James H. Lewis

200 19th Street, S. E., Washington, D. C.

Name and address of appellant's attorney

Curtis P. Mitchell, 508 Fifth Street, N.W., Washington, D. C.

Offense Vio. T. 22 - Sections 1501 & 1502

Concise statement of judgment or order, giving date, and any sentence

1 to 3 years on Counts 1, 2 and 3

1 year on Count 5 - to run concurrently with the sentence imposed on counts 1, 2 and 3 and to take effect upon the expiration of sentence imposed in Criminal No. 1156-57.

Name of institution where now confined, if not on bail

Washington Asylum and Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

June 30, 1958

[Date]

/s/ James H. Lewis
Appellant

/s/ Curtis P. Mitchell
Attorney for Appellant

APPELLANT'S CONSOLIDATED BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT *United States Court of Appeals*
For the
District of Columbia Circuit

No. 14, 601

FILED SEP 24 1953

JAMES H. LEWIS,

Joseph W. Stewart

CLERK

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 14, 617

JAMES H. LEWIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CURTIS P. MITCHELL
JOHN A. SHORTER, JR.

508 Fifth Street, N. W.
Washington, D. C.

Attorneys for Appellant.

QUESTIONS PRESENTED

I.

Where one has been charged in a count of an indictment with operating for a given period of time a lottery in violation of Title 22, Section 1501 of the D.C. Code, may he also be charged in another subsequent count of the indictment with having violated the same statute during the same period by having sold a chance in the same lottery.

II.

Where an accused is charged in separate counts of an indictment with the offense of operating a lottery (felony) and the offense of possessing lottery paraphernalia (misdemeanor), is it proper for the court to instruct the jury that the possession is prima facie evidence of the accused's guilt of the felony offense.

III.

It if be proper for the court to charge the jury that possession of lottery paraphernalia is prima facie evidence of guilt of the felony, must not the court also give in connection therewith a cautionary instruction on reasonable doubt and also be careful not to shift the burden of proof to the accused.

IV.

Whether evidence may be adduced over objection concerning objects purportedly seized pursuant to a search warrant, when it clearly appears that the said objects were not designated therein nor of the character specified; and where they were not reasonably probative of any of the issues.

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14, 601

JAMES H. LEWIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 14, 617

JAMES H. LEWIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S CONSOLIDATED BRIEF

JURISDICTIONAL STATEMENT

The appellant here appeals from two convictions following jury trials in the United States District Court for the District of Columbia upon indictments charging violations of the D. C. Lottery Laws (D. C. Code, 1951 Ed., as amended, Title 22, Sections 1501 and 1502).

The jurisdiction of this Honorable Court is invoked under Section 1291 of Title 28 of the United States Code, and Rule 37 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

A. Statement Relative to Case Number 14, 601

In case Number 1156-57 (In The District Court) the appellant was charged in a seven-count indictment with violations of the District of Columbia Lottery Laws and with having violated a specific provision of the United States Internal Revenue Law.¹ Count One of the indictment charged the appellant with having continuously, during the period from about September 24, 1957, to about October 1, 1957, been concerned as owner, agent and clerk, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game. The second, third, and fourth counts charged the appellant with having sold to one Houston Bigelow (undercover officer), within the same period alleged in count One, chances in the same lottery referred to in said count one. The first four counts were all alleged to have been in violation of Title 22, Section 1501 of the District of Columbia Code. Count Five charged the appellant with knowingly having in his possession and under his control, on October 1, 1957, notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in a lottery known as the numbers game. This count alleges a misdemeanor in violation of Title 22, Section 1502, of the D.C. Code. Count six of the indictment charged the appellant with having maintained a gambling premises in violation of Title 22, Section 1505, of the District of Columbia Code.² Count seven charged the appellant with not having paid the tax required pursuant to Title 26, U. S. C., Section 4411, of one engaged in the business of accepting wagers.³

¹ Title 26, U. S. C., Section 4411.

² and ³ On motion of the Government, counts six and seven were dismissed by the court during trial. (Tr. p. 179)

After the indictment the appellant filed a motion to dismiss the several counts of the indictment; the motion was argued to the trial court after the prosecutor made his opening statement. The motion was denied. (J. A. 12-13)

The principal witness for the government was one Houston Bigelow, an undercover officer of the Gambling and Liquor Squad, Metropolitan Police Department, who testified substantially as follows: that on September 24, 1957, he and an unidentified man engaged in conversation at 9th and O Streets, N. W., and together they went to the 1300 block of 9th St., N. W., and there they met a then unidentified man called Paul Dock, whom he identified at the trial as the appellant, and made a numbers bet with him (J. A. 14);⁴ that on the following day, September 25, 1957, he saw the appellant enter a lunch room in the 1300 block of 9th St., N. W. and he followed behind appellant, and while in the premises he asked appellant to accept a bet from him, and appellant at first refused but later he accepted two fifty cent bets which he (Bigelow) had written in ink on a piece of paper; that he next saw the appellant on September 26, 1957, at which time he played four twenty-five cent numbers with the appellant; that again on September 27, 1957, he saw appellant in the 1300 block of 9th St., N. W., and played two fifty cent numbers with him, after which the appellant went to the basement of premises 1310 9th St., N. W.; that on September 28, 1957, he (Bigelow) was seated on some steps in the 1300 block of 9th St., N. W. and upon seeing the appellant beckoned that he come to him and he played two twenty-five cent numbers with him whereupon appellant left the area; that on September 30, 1957, while in the 1300 block of 9th St., N. W. he (Bigelow) played two fifty cent numbers with appellant which numbers he (Bigelow) had written on a match book cover; that on October 1, 1957, he

⁴ Officer Carter testified that the man who accompanied Bigelow was one Roy Fraley a Marine Corps buddy, whom they met in Southeast, Washington, D. C. and took with them to the vicinity of the 1300 block of 9th St., N. W.

played two fifty cent numbers and an 82 parlay for which he gave the appellant two one dollar bills the serial numbers of which had been previously recorded; that a search warrant had been obtained by him for the premises 1310 9th St., N.W., and an arrest warrant had been obtained for the appellant; that he saw the appellant on the street from 12:20 P.M., until about 1:50 P.M. but did not make any effort to arrest him (Tr. pp 55-56).

The second witness called by the government was Officer Orville Carter, Jr., who was likewise assigned to the Gambling and Liquor Squad. He testified in substance as follows: that on September 26, 1957, while standing inside a vacant store place at 1317 9th St., N.W. he saw appellant walking up and down the 1300 block of 9th St., N.W. and observed a number of men and women approach appellant and give him something (which he believed was money and a slip of paper), after which the appellant tore up a piece of paper and tossed it to the ground, another piece of paper on which he would write he put in his shirt pocket. On the same date he saw appellant enter the basement of his house with his pockets bulging. He remained inside about 10 minutes, and when he reappeared on the street his pockets were without bulges; he also saw an unknown man who had bulging pockets enter 1310 9th St., N.W., together with appellant, remain three minutes and come out minus the bulges; that the next date on which he saw the appellant was September 28, 1957, on which date he observed a great number of men and women approach the appellant, the occurrences in relation thereto were the same as he had observed on September 26, 1957; that he also saw the appellant approach several cars that stopped in front of his premises; that he saw the appellant and unidentified man carrying a brown paper⁵ bag enter appellant's premises and thereafter leave without the bag; that on September 30, 1957, he saw appellant enter his house with bulging pockets, and later saw an unidentified man with bulging pockets

⁵ With respect to the same incident the witness first testified that the unknown individual had "bulging pockets" upon entering but was without the bulge upon leaving (J.A. 28).

and a woman with a bulging pocketbook enter appellant's premises; that he also on the same date saw a number of persons approach appellant on the street, the occurrences in respect thereof being the same as he had observed on the previous days. On cross examination he testified that he and Bigelow met one Roy Fraley, an ex-marine buddy, in Southeast D. C., and that he let Bigelow and Fraley out of the car near the vicinity of the 1300 block of 9th St., N. W. (Tr. p.96).

Corporal Robert Kissner testified that he was present at the time of the raid at 1310 9th St., N. W., and in describing their entry into the premises his testimony was to the effect that they walked into appellant's house not having waited to be admitted, and after having entered the house Sergeant Foran announced that he had a warrant for arrest and a warrant to search (J. A. 45). He also stated that they arrested, in the premises, some people who obviously were not committing a crime at the time (J. A. 45);⁶ that he searched appellant in the hallway and took from his "clinchd fist" two slips of paper which had figures and numbers written on them. In addition he allegedly recovered two marked one dollar bills from appellant's pants pocket (J. A. 42-43).

Sergeant William D. Foran, testified as a government witness and stated: that he executed the warrants and made the return on the search warrant; that he searched appellant's premises thoroughly and found nothing pertaining to the numbers (J. A. 51); that he questioned the appellant and the appellant denied that he was a numbers writer and denied having had any dealings with Officer Bigelow; that appellant also denied having in his possession the two marked dollar bills (J. A. 49).

Sergeant Foran was qualified by the court as an expert on the numbers game.⁷ He was thereafter allowed to express an opinion (expert)

⁶ Sergeant Foran also testified to the same effect (J. A. 48).

⁷ On cross examination Officer Foran was asked:
By Mr. Mitchell: Sergeant, did you say you were
an expert on numbers: No sir. I
didn't say that. (J. A. 47)

about: the mechanics of the number lottery operation; the identity of two pieces of paper seized from the appellant; and, the alleged use of the papers in the numbers operation.

At the conclusion of Officer Foran's testimony the government rested its case. Counsel for the appellant then renewed his several motions. The court denied the motions. (J. A. 53)

The defense called as its first witness Roy Fraley who testified substantially as follows: that he was an ex-marine and had met Carter while in the service; that Carter and Bigelow had picked him up one day, he did not remember the date and after drinking whiskey with them he accompanied them to 9th and O Streets, N. W., that "the other fellow" (obviously Bigelow) gave him some money with which to play the numbers; that in the presence of "the other fellow" he played the numbers with a man named Quick and not the appellant (J. A. 55-56).

The appellant testified in his own behalf: that he has resided in the District of Columbia for twenty three years; that he has been employed for the last five years by the District Messenger Company; that he did not see Bigelow on September 24; that the first time that Bigelow did speak to him he was in a restaurant and Bigelow called him outside, at which time Bigelow mentioned something about an 82 whereupon he told Bigelow that he had the wrong person (J. A. 56-57); that every day Bigelow would say that he wanted to play a number and he would tell him that he was no number writer; that on October 1, he had received no money from Bigelow, and that on that date he first saw Bigelow when the raiding party entered his house (J. A. 56-58); (1) that he at no time took bets from Bigelow (J. A. 60); (2) that he did not have government's exhibit number 1 in his pocket (J. A. 49, and Tr. 223, 224); that he did not have government's exhibit 2(a) in his possession at the time of his arrest and had no knowledge of it; that he had picked up government exhibit 2(b) from the floor where it had been dropped by one of the persons present in his house at the time of the raid; that the \$3,367.51 found in his house during the raid was part of the money he had obtained by mortgaging his home.

The final witness for the defense was Louis Sapoznick who testified: that he was the appellant's employer and that he had loaned him \$4,000 on his property.

The motion to compel an election or to dismiss was considered by the court at the conclusion of the case and was denied (J. A. 62-64).

The court charged the jury and submitted for its consideration counts one through five.

The jury found the appellant guilty on counts one, four and five, and not guilty on counts two and three.

The trial judge imposed the following sentences on the verdicts:

This appeal duly followed.

STATEMENT OF THE CASE

B. Statement Relative to Case Number 14, 617

In case number 512-57 (in the District Court) the appellant was charged in a six-count indictment with violations of the District of Columbia Lottery Laws and with one offense under the United States Internal Revenue Laws.⁸ The first count charged a violation under Title 22, Section 1501, of the D. C. Code (1951 Edition, as amended) in that from about January 11, 1957 to about January 18, 1957, the appellant was concerned as owner, agent and clerk, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game. The second, third and fourth⁹ counts each charged that on dates within the same period mentioned in Count 1, the appellant sold and transferred to one Samuel S. Carter a chance, right and interest in a lottery -- all in violation of the same statute under which the offense in Count 1 was laid. Count five of the indictment charged that on January 18, 1957, the

⁸ The offense alleged under the Internal Revenue Laws (violation of Title 26, United States Code, Section 4411), which was count six of the indictment, was dismissed by the government at the trial. (J. A. 90).

⁹ Count four was dismissed by the government when the Jury, after deliberation, could reach no agreement concerning the offense therein charged. (J. A. 130).

appellant was in possession of lottery or policy tickets (violation of Title 22, Section 1502, D.C. Code).

Prior to the appellant's trial in the United States District Court for the District of Columbia, several written motions were filed on his behalf, one of which was to dismiss certain counts of the indictment. The motion was argued before Judge Tamm, who denied it without prejudice to renew it at the trial. The court filed a written memorandum-order.¹⁰

The offenses charged in the indictment were tried to a jury presided over by the Honorable Judge Richmond Keech. In the course of making his opening statement the prosecutor stated to the jury:

As I indicated to you in the opening remarks, the defendant James H. Lewis is charged with the crimes of operating a lottery known as a numbers game in the District of Columbia from January 11th through January 18th, 1957, and with, on three occasions, selling a chance in that same lottery to an undercover officer of the Morals Division, and with the possession of numbers slips and records on the date of January 18, 1957.

And later in his opening statement, the prosecutor said:

When the Government has shown you these facts and shown you this defendant had numbers slips in his possession when placed under arrest, and that on the three dates I have mentioned he sold to the officer a chance in this same numbers lottery, that he was operating a lottery during this period of time which I have outlined, we will then, at the appropriate time, request you to return a verdict of guilty as indicted.

¹⁰ Judge Tamm's memorandum dated December 18, 1957, provided as follows: "This case is before the Court upon defendant's motion to dismiss which is predicated fundamentally upon the allegation that all counts of the indictment subsequent to Count One are duplicitous because they are included in the first count of the indictment. The Court has heard oral argument upon this motion and is of the opinion that the motion to dismiss should be denied. The counts of the indictment would be duplicitous only if the same evidence necessary to prove any one count of the indictment is identical with the evidence necessary to prove any other count of the indictment. The Court can determine this matter only upon hearing of the evidence, and accordingly, the Court will deny the motion to dismiss without prejudice to the defendant's right to renew the motion, if he considers it proper, at the termination of the Government's case."

After the prosecutor's opening statement, counsel for the appellant moved the Court to compel the government to elect whether it would proceed on Count one of the indictment or Counts 2, 3, 4 and 5 thereof. Counsel urged that the latter counts were included in Count One. The motion was denied.

The principal witness for the government was one Officer, Samuel S. Carter, of the Gambling and Liquor Squad, Metropolitan Police Department, who testified substantially as follows: That on January 11, 1957, he went to an establishment known as the B & B Grocery Store at 1320 9th Street, N. W.; and that there he saw the appellant being contacted by a number of people who gave him (the appellant) slips of paper and money; and that he also saw one person place a one dollar bet with the appellant on a number. (J. A. 93-94).

On the next day, the officer said that he was again in the same premises, and as on the day before, he saw the appellant "being contacted by a number of people who gave him slips and money" (J. A. 95); and, that he himself placed a bet with the appellant, which he saw the appellant record on a 3 by 5-inch white pad containing other bets.

According to the officer, he next saw the appellant on January 15, 1957.¹¹ On January 16, 1957, the officer went back to the same premises where he again observed the appellant being contacted by other people and observed him to take a bet from a man, and he stated that he also made a bet with the appellant at that time.

The officer said that he next saw the appellant on January 17th.¹² On the 18th of January, the officer said that he returned to the same premises armed with a United States Commissioner's Arrest Warrant for the appellant and a search warrant for premises 1320 9th Street, N. W. He also had in his possession three marked dimes; and a marked one-dollar bill. At the premises on that day, the officer allegedly made a

¹¹ and ¹²

The officer did not testify further concerning this date, except to say that he saw the appellant.

30-cent numbers bet with the appellant and paid for same with the 3 marked dimes. A short while later, according to the officer, the appellant left the premises and went next door to 1322 9th Street (called Jimmy's Cleaners), and was followed there by the officer who again contacted the appellant and made a one-dollar numbers bet for which the officer gave him the marked dollar bill. Immediately afterwards, the appellant was arrested and searched. A 3 by 5-inch pad and a slip of paper were taken from him at that time. The marked dollar bill was recovered from the floor.¹³

At the end of the government's case, the appellant again moved the Court: to compel the government to elect between Count One and the other counts; or, in the alternative, to dismiss Counts Two, Three, Four and Five of the indictment (J. A. 118). The motion was again denied (J.A. 118). The motion was renewed at the end of the entire case (J.A. 119-120); and again denied (J.A. 119-120). In course, the case was submitted to the jury, and after deliberating, it returned a verdict against the appellant of guilty of Counts One, Two, Three and Five. The sentence imposed on the verdict was "One (1) year to Three (3) years on counts #1, #2, and #3; One (1) year on Count #5; said sentences to run concurrently; said sentence to take effect at the expiration of sentence imposed in Criminal Case No. 1156-57." This appeal followed (J.A. 132-133).

¹³ The three marked dimes that the officer allegedly gave the appellant were not found on his person at the time the appellant was arrested and searched.

STATUTES INVOLVED

Title 22, Section 1501, District of Columbia Code reads as follows:
Sec. 22-1501 /6:151/. Lotteries - Promotion - Sale or Possession of Tickets.

If any person shall within the District of Columbia, keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy shall for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Title 22, Section 1502, District of Columbia Code reads as follows:
Sec. 22-1502 /6:151a/. Possession of lottery or policy tickets (Amended)

If any person, shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of Sections

863, 865, or 869 of this Act, he shall upon conviction of each such offense, be fined not more than \$1,000 or be imprisoned for not more than one year, or both. For the purposes of this section, possession, of any record, notation, receipt, certificate, bill, slip, token, paper or writing shall be presumed to be knowing possession thereof.

SUMMARY OF ARGUMENT

One

The repeated refusal of the trial courts to compel the government to elect between count one of the indictments and the other counts thereof that charged violations of Title 22, Section 1501: or alternatively to dismiss either count one or the others constituted reversible error for the following reasons: (1) The statute upon which the offenses were laid condemns only one offense, i. e., operating a lottery. This offense is of a continuing nature. The unit of prosecution and of punishment under the statute is the single course of conduct condemned therein and not the various acts that evidence the conduct. (2) The wording of the indictments in the two cases show that only one offense (of a continuing nature) was charged in the first counts thereof, and that the alleged offenses set out in the next three counts were part and parcel of the count one offense. The government's proof at trial conformed with the indictment in this respect.

Two (a)

It was error for the trial courts to have charged the juries in accord with that portion of Title 22, Section 1501 that possession of lottery paraphernalia is prima facie evidence of guilt of a violation of said section. It was error for the courts to so charge the juries because: (1) the provision referred to constitutes no part of the statute that states and defines the offense. It sets out a rule of law concerning the weight to be given to certain evidence and its sole purpose is to guide the court

in determining whether the government's evidence is sufficient to be submitted to the jury. (2) In giving the charge, the court authorized the jury to consider the same evidence in determining appellant's guilt of two separate and distinct offenses of unequal quality. The evidence of possession can properly be considered as to one or the other of the two offenses but not as to both of them.

(b)

Assuming that it was proper for the court to charge the jury in terms of the prima facie evidence provision of Title 22, Section 1501, the instruction given by the Court in case number 14, 617 was prejudicially erroneous. The court told the jury that the presumptive weight of possession was sufficient in and of itself upon which to base a finding that the appellant was guilty of the felony offense charged in count one unless possession of the slips was otherwise explained to their satisfaction. This was error, because: (1) it imposed a burden on the appellant that he was not required to carry; and (2) gave the evidence a force and effect which it did not possess.

Three

In case number 14, 601, the search warrant for premises 1310 9th Street, N. W., was improvidently issued because the facts contained in the affidavit, upon which it was predicated, did not establish adequate probable cause for the belief that the things sought to be seized were in the premises. The affidavit alleged no facts upon which such a belief could have been founded.

There was seized from the premises, ostensibly pursuant to the warrant, an automatic pistol and a large quantity of money. Neither of these things were of the type directed by the warrant to be seized. The admission of the money into evidence at the trial below was in violation of the appellant's right under the constitution: because the warrant was illegally executed, the property seized not having been of the character designated by the warrant.

The admission of the money into evidence was moreover prejudicial to the rights of the appellant because it had no probative value and tended to prejudicially influence the jury's mind against the appellant because of the amount thereof.

ARGUMENT ONE

THE TRIAL COURTS COMMITTED REVERSIBLE
ERROR IN FAILING TO COMPEL THE PROSECUTION
TO ELECT BETWEEN COUNT ONE AND COUNTS
TWO, THREE AND FOUR OF THE INDICTMENT.

The appellant's major contention, and one which is applicable to both of the cases under appeal, is that the repeated refusal of each of the trial courts to compel the government in the prosecution of the cases to elect between Count one of the indictment and the other counts of the indictment charging violations of Title 22, Section 1501; or, alternatively to dismiss either Count 1 of the indictment or the other constituted reversible and prejudicial error. As a predicate for his contention that the actions of the trial court in this regard constituted error, the appellant first calls attention to the wording of the statute on which these mentioned offenses (contained in counts one through four of each indictment) were based:

"If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1000 or be imprisoned not more than three years, or both . . ."

It is immediately seen that this statute generally makes it a crime for one to engage in two broad modes of conduct: the promoting of a lottery; the sale or possession of lottery tickets. An analysis of the statute shows that it may be violated in five different ways. The

statute makes it criminal for a person to: (a) set up, or promote a lottery; (b) be concerned as owner, agent, etc., in managing, carrying on, etc., a lottery; (c) sell or transfer any chance, right, or interest in any lottery; (d) sell or transfer any ticket, certificate, etc., to another which entitles that one to a chance of drawing or obtaining a prize in a lottery; (e) sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in, or share of a ticket, in any lottery or any such bill, certificate, etc.

There is but one general crime prohibited by the statute, even though there are a variety of ways by which the statute may be violated.¹⁴ The broad purpose of the statute is to make it a crime for one to be concerned in the operation of a lottery and to do certain things in connection therewith or in furtherance thereof which evidences that the person so doing these things is concerned in operating a lottery. That is, if one sets up or promotes a lottery, or becomes concerned in a lottery in one of the denominated capacities ('as owner, agent, or clerk, or in any other manner'), or does certain enumerated acts (a, b, c, d and e, above), he is guilty of violating the broad purpose made criminal by the statute, and is subject to the penalty provision contained herein. In other words, the statute is designed to be broad enough in its terms to define the various capacities by which a person may be concerned in a lottery operation, and the statute also designates the acts that a person so concerned does in the operation of a lottery. The statute does not create five different crimes. The offense made punishable under the statute is a course of conduct -- it is the course of conduct, the operation of a lottery, rather than the separate acts in such course that constitutes the punishable offense. The statute treats as one offense

¹⁴ The fact that there is only one statute involved herein distinguishes this case from Woods, et al v. United States (1957), District of Columbia Circuit 240 F.2d 27, where the question, somewhat similar to the one here, related to two separate statutes. This fact also distinguishes this case from the case of Gore v. United States (1957) District of Columbia Circuit, 244 F. 2d 763, Affirmed June 30, 1958, 357 U. S. 386, 2 L. Ed. 2d. _____ S. Ct.

all conduct "that arises from that singleness of thought, purpose or action, which may be deemed a single 'impulse' " ¹⁵ to operate a lottery. As was said by the Court in the case of State v. Wilhite, (1956) 40 N. J. Super. 405, 123 A 2d 237: "When an impulse is single, but one offense can be charged, no matter how long the act may continue. Stating it in a different way, a continuing crime or violation is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. The test is whether the individual act or acts is prohibited or the course of action which they constitute. If it is, the course of action which is prohibited there can be but one offense and one penalty. Blockburger v. United States, 284 U. S. 299, 52 S. Ct. 412, 83 L. Ed. 563 (1939); 8 Blashfield, Cyclopedia of Automobile Law and Practice, 527. "

The contention that the single course of conduct of being concerned in a lottery does not constitute more than one offense under section 22-1501 (even though it is shown that in furtherance of or incidental to the prohibitive course of conduct, one also does other acts prohibited by the statute), raises again the question: What has Congress made the allowable unit of prosecution, under a statute which does not explicitly give the answer. United States v. Universal C. I. T. Credit Corporation, (note 15 below) Bell v. United States, (1955), 349 U. S. 81, 75 S. Ct. 620, 99 L. Ed. 905.

The wording of the statute clearly demonstrates that it defines the course of the prohibited conduct and fixes the punishment therefor but the statute does not lend itself to the interpretation that Congress intended to cumulate the offenses thereunder or the punishment. It was within the power of Congress to have done so if this had been its design.

¹⁵ Language of the United States Supreme Court in the case of United States v. Universal C. I. T. Credit Corp. (1952) 344 U. S. 218, 73 S. Ct. 277, 97 L. Ed. 260, at 344 U. S. page 224, in the course of determining that a single course of conduct does not constitute more than one offense under section 15 of the Fair Labor Standards Act (52 Stat. 1060, 1068, 1069, as amended).

The failure of Congress to use words in the statute to say, in clear and explicit language, that multiple separate offenses are prohibited rather than one course of conduct, compels the conclusion that such was not the intent of Congress.¹⁶ For, as was said by the Supreme Court in the Bell case, supra, "When Congress has the will it has no difficulty in expressing it--when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress as undeclared will, the ambiguity should be resolved in favor of lenity." 349 U. S. at page 33, 99 L. Ed. page 910.

This Court has itself had at least one occasion whereupon the well recognized principal of statutory construction (mentioned above) was adhered to. In Bramblett v. United States, 231 F. 2d 489, it was said by this Court (per Fahy, Circuit Judge):

"In construing a criminal statute doubts should be resolved in favor of a construction that avoids subjecting an offender to multiple convictions by reason of a single uniform pattern of behavior even though the behavior continues over a period of time." 231 F. 2d 491.

As has been indicated, the statute makes punishable a "course of conduct"--the operation of a lottery¹⁷--and this is the "unit" of prosecution and of punishment; and not the various acts (enumerated in the statute) which evidence the prohibited course. It logically seems that the various specific acts prohibited by the statute¹⁸ allow for prosecution

¹⁶ "But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." United States v. Universal C. I. T. Credit Corp., supra, note 6, at 344 U.S. 221, 97 L. Ed. 264. See also: Fisher v. United States (1956) 9 Cir., 231 F. 2d 99, 103.

¹⁷ One of the definitions of operate (v. t.), according to Webster's Collegiate Dictionary, Fifth Ed., is: "to put into, or to continue in, operation or activity; to conduct."

¹⁸ Set forth at page 11, supra.

even though the exact capacity of the accused in the operation of the lottery is unknown.

For a person to engage in the operation of a lottery, he, in so doing, may do, and frequently must necessarily do, the acts specified in the statute. Nevertheless, in enumerating these acts Congress intended to make a "course of conduct" and not "individual acts" the gravamen of the offense. If this be not the construction of the statute it would seem that if two persons were "concerned" in the operation of a lottery over the same period, one as owner and one as clerk, the owner could only be charged with one offense because he was not detected to do any of the prohibited acts by reason of his insulated position; but that the clerk could be charged with as many offenses as the number of acts he commits in connection with his position. Congress certainly did not intend that this absurd result would obtain in applying the statute, but this certainly must be the result if the statute is considered to create different offenses.

The mandate that any person who shall set up or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or, do the other things prohibited by the statute, shall upon conviction suffer a certain penalty, means that any such person shall be guilty of a single offense in violation of the statute irrespective of the number of days that he is concerned as an owner, agent, or clerk, or the number of chances he sells or transfers, or the number of tickets that he possesses, and regardless of the period of time during which such action continues. The offense so committed, or how committed, is not divisible by the number of chances one sells, or the number of tickets that one possesses or the number of days one is concerned in the operation of the lottery. The doing of any one of the prohibited acts produces a single result, the violation of the statute. The statute prohibits a number of different courses of conduct that can be pursued, and the various capacities that can be occupied by those engaging in the operation of a lottery. The offense, that is, the

prohibited conduct or status, can be defined as a "continuing offense", the violation of which is committed by a single impulse and constitutes only one crime. See the rationale of the District Court in United States v. Universal C. I. T. Credit Corp., 102 F. Supp. 179; and also: Ex Parte Snow, 120 U. S. 274, 75 S. Ct. 556, 30 L. Ed. 658; Ex Parte Nielsen, 131 U. S. 176, 95 S. Ct. 672, 33 L. Ed. 118. State v. Wilhite, supra.

Just as it is, "clear that the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers,"¹⁹ it seems to the appellant to be equally clear that the particles of a continuing offense cannot be seized upon and charged as separate offenses for the purpose of prosecution.

In further support of his contention that the statute condemns a "course of conduct", the appellant points to the language of count one of each of the indictments herein.²⁰ The wording of count one of each indictment, ineluctably shows, at least in the view of the draftsman of the indictment that the offense charged is of a "continuing" nature. Therefore, how can it consistently and logically be said that the offense charged in the other counts of the respective indictments under Title 22, Section 1501 are not included in the continuing offense set out in count one thereof. The evidence against the appellant showed at most, in favor of the government's viewpoint, that the appellant was engaged in a single course of conduct during the period alleged in count one of the indictments, that is, the operation of a lottery by selling chances. The

¹⁹ Yates v. United States (1958) 355 U. S. 66, 2 L. Ed. 2d 95, 101, ___ S. Ct. ____.

²⁰ In case No. 512-57 it was charged in count one that, "continuously, during the period from about January 11, 1957, to about January 18, 1957, within the District of Columbia, James H. Lewis was concerned as owner, agent and clerk, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game." In case No. 1156-57 count one is identical except that the period involved is from September 24 to October 1, in the year 1957.

government's evidentiary showing under color of proving the other Counts of the indictments that the appellant accepted bets on the several dates alleged (all within the continuing period embraced in count one) constituted fragmentary charging of the count one offense -- and is condemned by law. United States v. Universal C. I. T. Credit Corporation, supra; Bell v. United States, supra.

The remarks of counsel for the government made in his opening statement in Case No. 512-57, which are set out in the Statement of the Case *supra*, p. 2, show that even in his view, the appellant was, on the dates charged in Counts 2, 3, and 4, selling chances in the same lottery as was charged in Count One of that indictment. Further in this regard, it is appropriate to note the observations of the learned trial judge in Case No. 1156-57 in passing upon the appellant's motion to compel an election between counts one and the other three counts under Title 22, Section 1501:

"(IN CHAMBERS)

"THE COURT: I am hard to convince when I get my mind set on something, but last night I began to waiver a little bit and I am still wavering about the question of the election. I am inclined to think that this situation does differ from that of a narcotics case, where one transaction does violate two different statutes and three separate sections, or two statutes.

"As I recall it, this is one statute which does denounce, as I see it, three different offenses, or says that there are three different ways in which one offense can be committed, and it would follow that if a man consistently, for a substantial period of time, sells lottery tickets, he is thereby operating a lottery, because the statute says further whoever does that is operating a lottery.

"I don't believe if he sells one of them or two of them or maybe three of them from time to time -- I don't know. We don't have to deal with them -- he would be operating a lottery. I think it has to be numerous enough to make it a substantial selling operation, to substantiate a lottery. When he does that, he is operating a lottery, and each time he does it, he commits an offense, because it is against the law to accept a numbers

bet or sell a ticket in a lottery. So that the proof of those Counts 2, 3, 4, and 5, I guess, although five is a separate, under a separate statute, 2, 3, and 4. The proof under those three counts prove Count 1. Count 1 has got to be proved by proof of sale of lottery tickets or authority to sell by someone else, lottery tickets.

"I am wondering now if counsel for defendant aren't right; that you have got to go the jury now, separating Count 1 from the three other counts. I am doubtful if you can go on both. I know I couldn't sentence separately, but I think they may be possibly the same."
(J.A. 62, 63)

Notwithstanding this view, the trial court later in the course of the colloquy ruled that the first four counts of the indictment would go to the jury and in so doing gave his reasons:

"I will adhere to my original ruling if they convict him, and you want to take an appeal, I will grant it. I think the question should be granted, and I think the only way to do it is to rule in favor of you instead of us.

I will let my ruling stand on that." (J.A. 63).

The appellant submits that it is no answer to the proposition herein urged to say that he was not prejudiced by the failure of the Court to compel an election between the counts or to dismiss the objectionable counts, because the sentence imposed was within the maximum that could be imposed upon one offense.²¹ The appellant urges that in facing the question raised herein this Court should "follow the principle recently expressed by the Court of Appeals for the Second Circuit in United States v. Pagano, 2 Cir. 1955, 224 Fed. 682, 683, that convictions are not to be affirmed in such a case 'unless the whole trial was conducted with the most scrupulous exactness' "²² Another reason also militates against the application of the doctrine of no prejudice because of the sentence. -- For it cannot be assumed:

21 Cf. Hirabayshi v. United States, 1943, 320 U.S. 81, 85, 63 S. Ct. 1375, 87 L. Ed. 1774; Wanzer v. United States, 1953, 93 U.S. App. D.C. 412, 208 F. 2d 45.

22 Dissenting opinion of Circuit Judge Bazelon in Greene v. United States, 1957, 246 F. 2d 677 at page 681; and see also footnote nine appended to above quoted language. See also the result in Nelms v. United States, 94 U.S. App. D.C. 267, 215 F. 2d 278 which is supportive.

" . . . that the District Court would have imposed the same aggregate sentence . . . This court said in Fulton v. United States, 1916, 45 App. D.C. 27, 42:

'Moreover, while the sentence imposed does not exceed the maximum penalty possible under a conviction upon either Count, it is mere conjecture to say that the court was not influenced by the double conviction.' " ²³

In the case of Nilva v. United States, 1957, 352 U.S. 385, 77 S. Ct. 431, 1 L. Ed. 2d 415, the Supreme Court had before it as one of the questions involved: Whether a general sentence upon a conviction for three offenses of contempt should not be remanded for sentencing where the government abandoned two of the offenses. The Court, in deciding this question said:

"There remains a question as to petitioner's general sentence. It was imposed following his conviction on each of the three original specifications. Although the government now undertakes to sustain but one of the convictions, it contends that petitioner's sentence should be left as it is because it was within the trial court's allowable discretion. We believe, however, that the court should be given an opportunity to reconsider petitioner's sentence in view of the fact that his conviction rests solely on the third specification.

"Accordingly, petitioner's conviction for criminal contempt on specification No. 3 is affirmed but his sentence is vacated and is remanded to the District Court for reconsideration of his sentence." 352 U.S. 396, 1 L. Ed. 2d 423."

The charging of the appellant in the manner done here violates his right to procedural due process under the Fifth Amendment of the United States Constitution. The prejudice to his rights, in charging him with many crimes where there is only one, goes much deeper than the obvious effect and influence upon the court in the matter of punishment. This method of charging is additionally evil and hurtful to the appellant's rights,

²³ Dissenting opinion of Circuit Judge Bazelon in Greene v. United States, supra, note 14.

in that: (1) it allows the prosecutor to present his evidence in a loose and blunderbus fashion; (2) the jury is likely to be improperly led to the conclusion that an accused who is charged with multiple offenses is at least guilty of some of them. These two instances of prejudice to the appellant's rights, make for a trial that has not been "conducted with the most scrupulous exactness", and cry out for correction by this Honorable Court.

WHEREFORE, appellant urges that the error committed was substantial and prejudicial and should therefore be reversed.

ARGUMENT TWO

(a)

IT WAS ERROR FOR THE COURTS BELOW TO CHARGE
THE JURIES CONCERNING THE EVIDENTIARY EFFECT
OF THE POSSESSION OF ALLEGED LOTTERY PARA-
PHERNALIA

The appellant contends that the portion of Title 22, Section 1501, which relates to the evidentiary force and effect of the possession of a copy or record of a chance, right or interest, etc.,²⁴ pronounces a rule of law solely for the guidance of the trial court in passing upon the sufficiency of the government's evidence; and should not be the subject of an instruction to the jury. The appellant submits that in cases such as the subject cases where a violation of Section 1501 and a violation of Section 1502 are charged, and where evidence is admitted tending to show that the accused had in his possession things of the character described in the last sentence of Section 1501, the jury should not be instructed to the effect that such possession is "prima facie evidence" of guilt of a violation of said section. This is so for the broad reason that

²⁴ ". . . The possession of any copy or record of any such chance, right, or interest, or of any such certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery."

the section referred to constitutes no portion of the statute which states and defines the offense. It is moreover so, in the cases here under appeal, for the reason that the court in charging the jury concerning the weight of such evidence authorized the jury to consider the same evidence in determining the appellant's guilt of two separate offenses in the indictment, i. e., the misdemeanor count (under Title 22, Section 1502) and the felony count (under Title 22, Section 1501).

In support of appellant's first reason, the appellant points to the fact that this sentence is not a part of the charging portion of the statute. It is thus seen that the part of the statute under discussion does not define any of the elements of the offense nor does it prescribe any conduct that is criminal thereunder. This provision simply provides that the possession of certain objects shall be "prima facie evidence" that the possessor was "at the time and place of such possession" guilty of the offense stated in another portion of the said statute.

This provision of the statute sets out a rule of law concerning the weight to be given to certain evidence. This rule of law, the appellant contends, is of no significance to the jury in passing upon the guilt or innocence of the accused. The appellant says that its purpose is for the guidance of the court in passing upon whether the government's evidence is sufficient to allow the case to go to the jury. If in the government's case it was shown that the accused was in possession of the things that fall within the prohibited category and, if in addition thereto, the government has shown other and independent evidence present "at the time and place of such possession" relating to the operation of a lottery, then a prima facie case has been made warranting its submission to the jury.²⁵ If it had been the intention of the legislature that this provision of the statute should prescribe a rule of law which should be called to the

²⁵ If the government's contention be correct, it must then be conceded, that a higher degree of proof is required for a conviction of the misdemeanor (Section 1502), than is required for a conviction of the felony (Section 1501), because in the former, knowledge is necessary, while in the latter bare possession is sufficient.

attention of the jury, it would have been made a part of the charging portion of the statute rather than have been placed at the very end.

In further support of his contention that the Court should not have charged the jury with respect to "prima facie" evidence, in either of the cases, the appellant again calls attention to the several offenses charged in the respective indictments and the interrelationship between them and their overlapping nature.

It has previously been argued (Argument 1, Supra) that the offenses charged in count one and counts two, three and four, respectively, constitute but a single offense -- the operation of a lottery. Count five of each indictment charged the offense of possession of lottery slips, in violation of Title 22, Section 1502 of the D. C. Code. In the government's view (adopted by the trial court) counts five were separate and distinct from the offenses charged in counts one. But how could this be so, especially when the government urged: (1) that the jury should be charged that the possession of the alleged numbers slips constituted an offense under 1502; and (2) that the possession of the slips also allowed for an instruction that it constituted evidence of guilt under Section 1501. It is obvious that in both instances the same possession is meant. How, in the name of logic and legality, can this intransigent proposition be reconciled? The appellant urges that if count five and one be separate, and proof of the offense under count five be complete by merely showing possession, then it is improper to say that the evidence of this completed offense can be lifted up and become the subject of an instruction to the jury to the effect that it is evidence in and of itself sufficient to maintain and warrant a conviction of the greater offense of operating a lottery.

The appellant contends that the evidence of possession can be considered by the jury with respect to either the operation of a lottery count of the indictments or the possession of lottery slips counts, but not as to both. Otherwise, the doctrines of merger of lesser offenses and identity of offenses means nothing. See: Spies vs. United States, (1943), 317 U.S. 492, 87 L. Ed. 419 and Plummer vs. United States, (1951), District

of Columbia Circuit, 189 F. 2d 19, 23 Cf. Gavieres vs. United States, (1911) 220 U.S. 337, 58 L. Ed. 489. The error committed in the cases below is blatant, for, it cannot but be concluded that the trial courts in their respective charges to the jury allowed for the consideration by the jury the evidence in connection with a felony, sufficient only in respect of a misdemeanor, which was improper. Plummer vs. United States, supra. But if the allowance of same is supportable, then where is the justification for letting the jury (by way of instruction) deliberate upon both offenses. For certainly, in this instance both offenses covered precisely the same evidentiary ground and only one should have been submitted to the jury. See Berra vs. United States, (1956), 351 U.S. 134, 100 L. Ed. 1016.

(b)

ASSUMING ARGUENDO THAT IT WAS PROPER FOR THE TRIAL COURTS TO HAVE CHARGED THE JURY CONCERNING THE EVIDENTIARY EFFECT OF THE POSSESSION OF ALLEGED LOTTERY PARAPHERNELIA, THE TRIAL COURT, IN CASE NUMBER 14,617, GAVE THE JURY AN ERRONEOUS INSTRUCTION ON THE SUBJECT.

The appellant has argued above, that it was error for the trial court to charge the jury in terms of the prima facie evidence provision contained in Title 22, Section 1501; if the appellant be wrong in this contention, he next argues that the instruction on this matter given by the trial judge in case number 14,617 was prejudicially erroneous in several respects. In his instructions to the jury the trial court said:

"Now, Count 1 of the indictment is based on the following provision of the D. C. Code of laws, and in so far as pertinent to your inquiry, I will read it to you:

'If any person shall within the District of Columbia, keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting or advertising, directly or indirectly, any

policy lottery, policy shop, or any lottery, he shall be punished as provided by the statute.'

"In the eyes of the law a lottery is the awarding of a prize by chance. The exact method adopted for the application of chance to the distribution of the prizes is immaterial.

"In the eyes of the law, the so-called numbers game is a lottery.

"And the law goes further, to provide as follows:

'The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.'

"So if you should find that this defendant had in his possession numbers slips, that is sufficient upon which to base a finding that the defendant was guilty of the charge as set forth in Count 1, unless his possession of the slips is otherwise explained to your satisfaction."

The appellant makes two complaints about the Court's above-noted instructions, and particularly, the last paragraph thereof. It is urged that this instruction improperly: (a) imposed a burden on the appellant which he was not required to carry; and (b) gave the evidence a force and effect which it did not possess. The case of State vs. Bryant, (1957) Supreme Court of North Carolina, 245 N. C. 645, 97 S. E. 2d 264, is helpful to both of the appellant's contentions concerning the trial court's charge. In the Bryant case the accused was charged with having in his possession "alcoholic beverages upon which the taxes imposed by the laws of Congress of the United States and by the laws of the State of North Carolina had not been paid." The evidence at the trial showed that there was found on the accused's premises two unstamped half-gallon fruit jars containing alcoholic beverages. The statute, which charged

the offense, provided that possession of alcoholic beverages that do not bear tax stamps shall be prima facie evidence of unlawful possession of alcoholic beverages upon which tax has not been paid. (G. S. 18:48, 18:60). The appellant was found guilty by a jury and he appealed. One of his contentions on appeal was that the trial court had committed error in the portion of its charge to the jury defining the effect of the statutory evidence when it said: "Prima facie evidence or a prima facie case is meant that which is received and continues until the contrary appears. It is meant such as in the judgment of law is sufficient to establish the facts and, if not disputed, remains sufficient for that purpose. In other words, prima facie evidence is meant the evidence sufficient to carry the case to the jury and to justify but not compel a verdict which suffices for the proof of the particular fact until contradicted and overcome by other evidence."

The Supreme Court of North Carolina, agreed with the accused's contention that the above charge of the trial court was inaccurate, because it endowed prima facie evidence with undue weight and effect and the court, therefore, reversed the conviction. It was the last sentence of the above quoted portion of the court's charge that the court found inaccurate and erroneous and not in harmony with the correct statement of law embodied in the rest of the charge. In this regard, the court said:

"The statute created a factual inference or conclusion to be drawn from other facts recited in the statute. This inference or conclusion is denominated prima facie evidence. It, like all the other evidence, must establish defendant's guilt beyond a reasonable doubt. Defendant is entitled to have the jury scrutinize this evidence with a presumption of innocence in his favor. It does not suffice for proof until contradicted and overcome by other evidence, it may fall because of its own weakness. The facts which call for an application of the statutory rule of evidence may, when viewed in their proper perspective, cause the jury to reject as unworthy of belief the prima facie evidence created by the statute. The prima facie evidence created by the statute had no greater legal force than the testimony of the witness that defendant's

breath had the odor of non-tax paid whiskey. It was the duty of the jury to weigh and assess each.

"The Court correctly charged the jury that the prima facie evidence was sufficient to carry the case to the jury and to justify but not compel a verdict adverse to the defendant, but the next sentence of the charge declaring the prima facie evidence sufficient proof until overcome and contradicted by other evidence imposed a burden on defendant which he was not required to carry and gave to the evidence a force and effect which it did not possess." (97 S. E. 2d 267; emphasis in original)

The appellant does not argue that the language of the trial court in the Bryant case, which was held to be erroneous, and the language of the trial court in the instant case, which is urged as erroneous, are identical in their phraseology, however, it cannot be gainsaid that they are identical in substance and effect and are both therefore subject to the same criticism.

The statement of the trial court hereinbefore set out comprises the court's entire instruction regarding the offense charged in count one of the indictment. In this statement, the court simply read the statute that charged the offense; told the jury briefly what a lottery was, and then told them that the presumptive weight of possession was sufficient upon which to base a finding that the appellant was guilty of the felony offense charged in count one unless his possession of the slips was otherwise explained to their satisfaction. This bare statement gave undue force and effect to the weight of possession of numbers slips. It told the jury that they would be authorized to convict if they found possession alone, which assuredly is wrong. The charge does not tell the jury, as it should, that they would have the right to acquit the appellant if upon a consideration of all of the evidence they had a reasonable doubt as to his guilt. The jury should have been told this in connection with the "presumptive evidence" charge, in order to have afforded the appellant due process of law and to have guarded against the jury receiving and giving undue prominence to the presumption.

In the case of Ward v. United States (1938) 5th Cir., 96 F. 2d 189, the appellant was convicted of one charge of possession and transportation, and one charge of possession of whiskey in containers not having revenue stamps affixed as required by law. Upon an appeal from the said convictions, the appellant raised many specifications of error. One of them related to the trial court's charge concerning presumptive weight of possession of unstamped liquor. The trial court's charge to the jury on this matter was not set out in the written opinion of the Circuit Court of Appeals, but the appellant's contention was stated therein as follows:

"That the court erred in the charges given and refused, in that (a) after charging the jury that they would be authorized to convict of illegal possession of liquor, if liquor in containers having no stamps on them was found in defendant's possession and nothing else was proven, they were instructed that 'if the evidence goes further and convinces the jury that the liquor was possessed not for the purpose of selling it, but for the purpose of pour it out or drinking it, then the jury ought to find a verdict of not guilty', because that charge placed the burden on the defendant to acquit himself, instead of upon the Government to convict him, as it ought to have done; (b) there was a refusal to give defendant's requested charge, that if the jury had a reasonable doubt from all the evidence, as to whether or not defendant possessed intoxicating liquor for the purpose of sale, they should acquit him."

The Fifth Circuit Court of Appeals in meeting the appellant's contention in this regard said as follows:

"We think, too, that the point against the charge is well taken. As given, it had the effect of requiring defendant to convince the jury that he was not, instead of requiring the United States to convince them that he was, guilty under the statute. It was no sufficient compliance with appellant's request for a correcting charge, that 'if the jury had a reasonable doubt from the evidence as to whether or not the defendant possessed intoxicating liquor for the purpose of sale, they should acquit him,' for the court to state, as it did, 'I have already charged upon reasonable doubt in general terms.' The court should have modified

its charge as given to advise the jury that while proof of the possession of whiskey, in tax-unpaid containers standing alone made out a prima facie case, yet if upon all the evidence the jury had a reasonable doubt as to whether the possession was for a prohibited or a nonprohibited purpose, they should acquit him.
(Emphasis supplied.)

Needless to say, the appellant's conviction in the Ward case was reversed for, among other things, the failure of the trial court to give an instruction on a reasonable doubt from all of the evidence in conjunction with the charge on the prima facie evidence arising from possession. The trial court in the instant case also failed to so instruct the jury. Significantly, the rule of law here relied upon is that the general instruction of the court on reasonable doubt, given earlier in its instructions, does not obviate the duty of the court to give it again with its charge on presumptive evidence. See State vs. Bryant, supra, and cases discussed therein at 97 S. E. 2d page 266.

As noted above, the trial court's charge was erroneous for the additional reason that it had the effect of shifting the burden upon the defendant to "acquittting himself instead of upon the government to convict him". This occurred in the instant case by virtue of the court telling the jury that bare possession was sufficient upon which to base a conviction "unless his possession of the slips is otherwise explained to your satisfaction". This instruction violates the well settled rule of law that "it is manifest that no burden or duty is imposed on the defendant merely because a statutory rule of evidence has come into play", State vs. Bryant, 97 S. E. 2d at page 266. See also: Bulman vs. United States, (1938) 8 Cir., 94 F. 2d 197, 199; Surding vs. United States, (1950) 6 Cir., 179 F. 2d 419, 422; Duncan vs. United States (1928) 7 Cir., 23 F. 2d 3, 4; Gunnoe vs. United States, 34 F. 2d 12; McAdams vs. United States, (1934) 8 Cir., 74 F. 2d 37; Ezzard vs. United States (1925) 8 Cir., 7 F. 2d 808, 811.

ARGUMENT THREE

IN CASE NO. 14, 601, THE SEARCH WARRANT FOR PREMISES 1310 9TH STREET, N.W., WAS IMPROVIDENTLY ISSUED AND ILLEGALLY EXECUTED, AND THE ARREST WARRANT FOR APPELLANT WAS ALSO ILLEGALLY EXECUTED, THUS RENDERING THE SEIZURE ILLEGAL AND THE ADMISSION INTO EVIDENCE OF THE ITEMS PREJUDICIAL ERROR.

Appellant urges that the search warrant in case number 14, 601 for premises 1310 9th Street, N. W., was improvidently issued because the facts contained in the affidavit, on which it was predicated, did not establish adequate probable cause to believe that the things sought to be seized were in the premises directed to be searched. The affidavit, which, incidentally, was sworn to by officer Carter and officer Bigelow, contains no allegation that either of the officers had been inside the premises or had seen therein the items and objects described in the search warrant. (J.A. 1).

This Court in the case of Schencks vs. United States (1924), 55 App. D.C. 84, 2 F. 2d 185, decided that an affidavit similar to the one presented in this cause was insufficient for the issuance of a warrant. See: Byars vs. United States, (1927) 273 U.S. 28, 71 L. Ed. 520.

The warrant commanded that the officers "search forthwith the place named for the property specified." The property specified was namely: lottery tickets, lottery policies, books, papers, memorandum and other device used in setting up, promoting or maintaining a policy lottery.

The return on the search warrant disclosed that the property taken pursuant to the warrant consisted of \$3,367.51 in cash and an automatic pistol. The pistol was not offered in evidence.

Obviously the aforementioned seized articles were not of the character designated in the search warrant.

Assuming arguendo the validity of the issuance of the search warrant, appellant contends that the seizure of goods or articles not

specifically enumerated or called for on the face of the search warrant and their use in evidence against him violates his constitutional rights.

In Marron vs. United States, (1927) 275 U.S. 192, 72 S. Ct. 231, the Supreme Court said: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." (275 U.S. 196)

Significantly, this Court considered the same proposition in the cases of United States vs. Kelleher, 2 F. 2d 934, and United States vs. Burrows, 2 F. 2d 935, and affirmed the orders of the District Court which directed the return of the property improperly seized. See also: Kerwin vs. United States, 5 F. 2d 282; United States v. Brunett, 53 F. 2d 219; United States vs. Siegal, 60 F. 2d 136.

Appellant urges that it was error for the court to permit the prosecution over objection, to inform the jury that the appellant had, at the time of his arrest, the cash sum of \$3,367.51,²⁶ in addition to the \$422.00 which was found on his person.²⁷ Obviously, the calculated purpose was to arouse suspicion in the minds of the jurors. In his summation to the jury the prosecutor stated:

"Also taken from the pockets of this defendant money amounting to over \$400.00, and that included in the \$400.00, which was taken from this defendant were the two recorded one-dollar bills which earlier Private Bigelow had played with this defendant, and the evidence is that the recorded dollar bills which are in evidence, were checked. The serial numbers were checked with the record made by the Police Headquarters, and the evidence will show that from the premises a little over \$3,000.00 was taken."

And in arguing further he said:

"I say to you, His Honor will charge you that possession of numbers slips, are prima facie evidence that this defendant was operating a lottery, so for some

26 The return disclosed that \$3,367.51 was seized.

27 The appellant so testified. (J.A. 58)

unknown reason they have money. What difference does it make? It was borrowed on April, 1956. What difference does it make? Can you say that was the same money which he had borrowed in April, 1956 and kept it right along in his premises, and he also comes in and tells you that the defendant is working from four to twelve, and you as reasonable men and women, know when horse races go on, and you as reasonable men and women know that numbers go on from eleven to three, and this individual goes to work at four o'clock."

The government's designed purpose was to prejudice the appellant in the eyes of the jury. It is inescapable but that the prosecutor's desire and intention was to give the jurors the impression, or at least to cause them to suspect, that appellant's having so much cash money in his house, was necessarily indicative of his engagement in some illicit or illegal venture, to wit, the operation of the numbers lottery.

Appellant urges that the trial court committed prejudicial error. The court in permitting the government to adduce the testimony as to the money possessed by the appellant, other than what was on his person, compelled the appellant to explain his possession. Notwithstanding, the fact that it was clearly apparent, or should have been, that there had been no relevant showing of a relationship between the money and the offense with which the appellant was charged. The money, therefore, was not probative of any issue involved in the case, and hence was improperly allowed an unwarranted significance to the prejudice of the appellant.

CONCLUSION

In conclusion, appellant submits to this Honorable Court that the Courts below committed prejudicial and reversible error as to each and all of the points hereinbefore set forth in the appellant's consolidated brief and therefore counsel respectfully urges that this Honorable Court reverse the verdicts and judgments entered against the appellant by the Courts below.

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Counsel for Appellant

PETITION FOR REHEARING EN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

DEC 19 1958

Joseph W. Stewart

CLERK

No. 14,601

JAMES H. LEWIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 14,617

JAMES H. LEWIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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PETITION FOR REHEARING EN BANC

IT IS respectfully urged that this appeal be reheard by the full bench of this Honorable Court; and upon said rehearing the judgment of this Court,¹ affirming the appellant's conviction, be reversed and set aside.

¹ Rendered on December 4, 1958.

The appellant was convicted in two cases by a jury in the United States District Court upon indictments that charged violations of the District of Columbia Lottery laws.² In the respect that is material in this appeal, the two indictments were similar. In each case the appellant was charged in Count one with the offense of continuously during a certain one week period (January 11, 1957 to January 18, 1957, in one case, and from September 24, 1957 to October 1, 1957, in the other) with being concerned as owner, agent and clerk, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game. Also, in each case the appellant was charged respectively in three subsequent Counts of the indictment with selling a chance in a lottery to an undercover officer. Significantly, two things appear in this situation:

(1) The date of the offenses charged in the three counts subsequent to count one all occurred during the same one week period that is set out in count one of each of the two indictments; that is, the appellant is charged with selling chances in a lottery during the same short period of time that he is accused with being illegally concerned therein.

(2) The offenses charged in the three counts that are subsequent to count one in each of the indictments are violations of the same statute that is violated when one commits the offense charged in Count one (Title 22, Section 1501, D. C. Code).

Within the context of the anomolous condition set out above, the appellant raised as his principle contention in this joint appeal that the subsequent counts (two, three and four of each indictment) should have been dismissed because under the statute (Title 22, Section 1501) the allowable unit of prosecution is a course of conduct and not the separate acts in the course. This contention, it was urged by the appellant, was soundly supported: by the wording of the statute; and by the failure of

² Title 22, Section 1501, 1502, D. C. Code.

Congress to use adequate words in the statute to say in clear and explicit language, that multiple separate offenses are prohibited rather than one course of conduct.

Two Supreme Court cases of recent years were cited by the appellant as authority for his contention: United States v. C.I.T. Credit Corporation³ and Bell v. United States.⁴

In the interim, since the opinion of the Court in this case was handed down, the Supreme Court, four days ago, reaffirmed the principles of the C.I.T. case and the Bell case, supra, by its eight to one decision in the case of Ladner v. United States (December 15, 1958). In the Ladner case the question was whether the congressional intent in legislating former 18 U.S.C. Section 254 (relating to criminal resistance to federal officers) contemplated that where an accused fired a single shotgun blast at two officers and wounded them both, one offense was committed under the statute or two offenses. The petitioner Ladner had been convicted of two offenses and sentenced to consecutive terms of ten years for each one. In meeting the question, the Court held:

"It is therefore apparent that Section 254 may as reasonably be read to mean that the single discharge of the shotgun would constitute an 'assault' without regard to the number of federal officers affected, as it may be read to mean that as many 'assaults' would be committed as there were officers affected. Neither the wording of the statute nor its legislative history points clearly to either meaning. In that circumstance the Court applies a policy of lenity and adopts the less harsh meaning. '[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.' United States v. Universal C.I.T. Credit Corp., 344 U. S. 218, 221-222. And in

³ (1952) 344 U. S. 218, 73 S. Ct. 277, 97 L. Ed. 260.

⁴ (1955) 349 U. S. 81, 75 S. Ct. 620, 99 L. Ed. 905.

Bell v. United States, 349 U. S. 81, 83, the Court expressed this policy as follows: 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' See also Prince v. United States, *supra*; Gore v. United States, 357 U. S. 386, 391. This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act affecting more than one federal officer, Congress can make that meaning clear. We thus hold that the single discharge of a shotgun alleged by the petitioner in this case would constitute only a single violation of Section 254." (Advance Sheet, pp. 8-9)

In the opinion rendered by this Court herein, it was decided that since concurrent sentences were imposed in the two cases, even if there were merit in the appellant's claim of error, he cannot complain, "as any such error would be cured by the concurrent sentence. Cf. Hirabayashi v. United States, 320 U. S. 81 (1943); Wanzer v. United States, 93 U. S. App. D. C. 412, 208 F. 2d 45 (1953)."

It was anticipated by the appellant that this Court in deciding this case would invoke the holdings of the Hirabayashi and the Wanzer cases. It was urged by the appellant that the invocation of the holdings in those two cases does not clearly resolve underlying problems inherent in the sentencing process. It could not be assumed, said the appellant, "that the District Court would have imposed the same aggregate sentence" had it not been for the multiple convictions in each case.⁵ The appellant

⁵ In making this contention, the appellant relied upon language in the case of Fulton v. United States (1916) 45 App. D. C. 27, 42; the dissenting opinion of Circuit Judge Bazelon in Green v. United States (1957) 246 F. 2d 677 at page 681, certiorari granted, 78 S. Ct. 1386 (1958); Nilva v. United States (1957) 352 U. S. 385, 77 S. Ct. 431, 1 L. Ed. 2d 415.

renews that contention here, and respectfully says that this reason alone merits the granting of a rehearing of this appeal and the consideration of the entire bench. Of course, the point made above concerning the sentencing process is never reached where the Court avoids deciding whether the accused's conduct amounted to one crime or more than one crime. It seems that an endless circle is in motion. It is of utmost importance in the administration of criminal justice in the District of Columbia for a determination to be made as to whether the present manner of charging an accused in a lottery case is lawful or unlawful. It is important that the question of statutory construction raised in this appeal be met -- What is the unit of prosecution under the statute; is it a course of conduct, or the separate acts in the course, or is it both, as is the situation here. In view of the decisions of the Supreme Court, in the C.I.T. case, supra; the Bell case, supra; and in Prince v. United States, 357 U. S. 386, 391; and in the very recent Ladner case, the question is not of little importance. For this court to fail to meet the question, by resorting to what it describes as "well settled rules", is to give unwitting sanction to a procedure in the charging of crime, which is under constant attack. Especially is this so, where in the long ago past the "well settled rules" relied upon was not considered a barrier of too enormous proportions. Fulton v. United States (1916), 45 App. D. C. 27, 42.

CONCLUSION

Wherefore, upon the basis of the foregoing, it is respectfully urged that this petition for rehearing en banc be granted.

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CERTIFICATE OF COUNSEL

Curtis P. Mitchell, counsel for the appellant, hereby certifies that the foregoing petition for Rehearing is presented in good faith and not for delay.

Curtis P. Mitchell

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition was served upon Oliver Gasch, United States Attorney, by leaving same at his office, United States Court House, Third and Constitution Avenue, N. W., Washington, D. C., this 19th day of December 1958.

Curtis P. Mitchell

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14,601 and 14,617

JAMES H. LEWIS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court
for the District of Columbia

OLIVER GASCH,
United States Attorney.

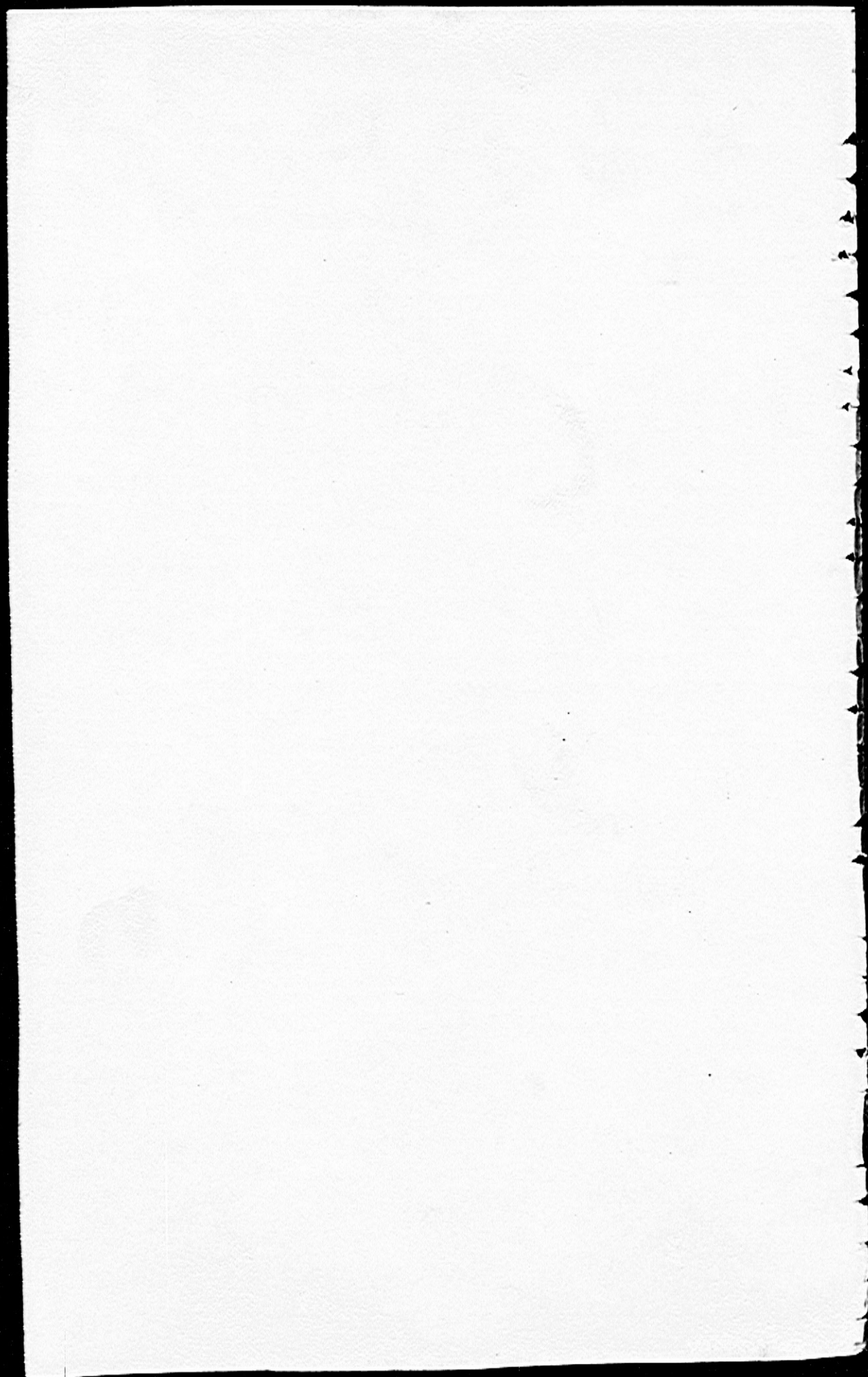
CARL W. BELCHER,
JOHN D. LANE,
Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

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149



STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee the questions are:

(1) Are operating a lottery and selling numbers separate offenses, and is this question reached where concurrent sentences were imposed?

(2) Was the presumption of operating from the fact of possessing number slips intended by Congress solely as a guide for judges, and is this point reached where not raised below?

(3) Was a search warrant for appellant's premises improvidently issued where appellant made numerous sales of numbers with an undercover officer and many observations of activities in and around appellant's house indicated it was a numbers drop?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14,601 and 14,617

JAMES H. LEWIS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In separate indictments, separately tried, and resulting in two judgments of conviction consolidated for review, appellant had been charged as follows: (1) *D.C. Cir. 14617*¹—operating a lottery from January 11 to January

¹In D.C. Cir. 14617 (D.D.C. Crim. No. 512-57) appellant was found guilty by the jury (J.A. 129-130) on *count one* (operating a lottery from about Jan. 11 to Jan. 18, 1957); *count two* (numbers sale to Samuel E. Carter on Jan. 12); *count three* (similar sale—Jan. 16); *count five* (possession of number slips on Jan. 18) (J.A. 86-87).

As the jury had not decided appellant's guilt on *count four* (a numbers sale on Jan. 18) at the time of its rendition of a partial verdict, this count was dismissed on Government motion (J.A. 130). At the beginning of the trial *count six* (failure to pay

18, 1958, sales of numbers on different dates to Samuel E. Carter during that period, possession of number slips, and failure to pay a special tax; (2) *D.C. Cir. 14601*²—operating a lottery from about Sept. 24, 1957 to Oct. 1, 1957, sales of numbers to Houston Bigelow during that period, possession of number slips, maintaining gambling premises at 1310 9th Street, N.W., and failure to pay the applicable special federal tax.

Officer Samuel E. Carter, of the Metropolitan Police Gambling and Liquor Squad, testified³ that, about one P.M. on January 11, 1957 he went to a delicatessen in the thirteen hundred block of Ninth Street N.W. where he observed a number of people contact appellant, giving him slips of paper and money. He also heard one customer place a dollar bet on a particular number, appellant placing the money in a bag behind the counter and writing the bet on a three-by-five white pad (J.A. 93-95). After making similar observations the next day in the same place

special federal tax) was dismissed on Government motion (J.A. 90).

Appellant was sentenced to serve 1 to 3 years on Counts 1, 2 and 3, and to serve 1 year on count 5, said sentences to run concurrently (J.A. 132). These sentences were ordered to be served at the expiration of the sentence imposed in *D.C. Cir. 14601* (J.A. 132). See note 2.

² In *D.C. Cir. 14601* (D.D.C. Crim. No. 1156-57) appellant was found guilty by the jury (J.A. 78) on *count one* (operating a lottery from about Sept. 24, 1957 to Oct. 1, 1957); *count four* (numbers sale to Houston Bigelow on Oct. 1, 1957); *count five* (possession of number slips on Oct. 1, 1957) (J.A. 9-10).

Appellant was found not guilty on *counts 2 and 3* (J.A. 79), charging sales of numbers to Houston Bigelow on Sept. 24 and Sept. 27, 1957, respectively (J.A. 9-10). *Count 6* (maintaining gambling premises at 1310 9th St. N.W.) (R. 288, *D.C. Cir. 14601*) was dismissed on Government motion during the trial (R. 179). (This count is inadvertently omitted from the appendix (J.A. 10).) *Count 7* (failure to pay special federal tax) was similarly dismissed. (It is erroneously numbered "6" in the appendix.)

Appellant was sentenced to serve 8 months to 2 years on count one, 8 months to 2 years on count 4, and to serve one year on count 5—all sentences to run concurrently (J.A. 80).

³ In *D.C. Cir. 14617*. See note 1.

Officer Carter succeeded in placing a bet on a number which appellant recorded on a three-by-five white pad containing other bets (J.A. 95). On January sixteenth the officer made similar observations, heard appellant give numbers information upon request, overheard the placing of another numbers bet, and made another bet himself, witnessing appellant again utilize the bag behind the counter (J.A. 96-97).

On January 18, 1957 an arrest warrant and a search warrant for the delicatessen were issued. Officer Carter was supplied with three marked dimes and a dollar bill with a recorded serial number (J.A. 97-98). At the delicatessen the officer made a thirty-cent number bet with appellant, giving him the marked dimes and playing the same number as on previous days (J.A. 98). Appellant left and went to a cleaner's next door where the officer again contacted him and placed one dollar on the digit "7", giving the appellant the identifiable bill (J.A. 99).

Sergeant William D. Foran arrested appellant in the cleaning establishment, appellant denying he had written any numbers (J.A. 109). The sergeant took from appellant's pocket over five hundred dollars (J.A. 109-110). As the officer was examining the bills appellant removed his overcoat and moved away. Appellant put his right hand in his trouser pocket and then moved it to the back of his trousers at the belt line. The sergeant then ran his fingers around appellant's waist, finding nothing. Sergeant Foran then had Officer Mills unbuckle appellant's belt and shake his trousers, immediately after which the marked dollar bill was found crumpled at appellant's feet (J.A. 110-111). Appellant shouted "You didn't get it off of me; I have witnesses" (J.A. 112).

Officer Mills recovered a three-by-five white pad from appellant's overcoat (J.A. 105; Gov. Ex. 1, J.A. 116). It contained several numbers bets. In addition Sergeant Foran recovered a similar pad from appellant's jacket and a piece of paper from appellant's shirt containing several numbers bets (J.A. 112-113; Gov. Ex. 3, J.A. 116).

Observations of the police in September, 1957, indicated that appellant, though awaiting trial on the previous charges, was doing business in much the same fashion as he had in the beginning of the year. Officer Orville Carter, Jr. testified⁴ to observations of lottery operations

⁴ This testimony was in D.C. Cir. 14601. See note 2. It is only in this case that appellant claims the search warrant was issued without probable cause (Arg. 3, Br. 32). Appellant filed no motion to suppress before trial (J.A. 34, 31-32). Nevertheless the court permitted appellant, in the course of trial, to make an oral motion directed against the sufficiency of the search warrant (J.A. 34). Examined in the absence of the jury, Officer Orville Carter, Jr. testified that he made observations of appellant's home at 1310 9th Street N.W. on September 26, 28 and 30, 1957, utilizing a building across the street (J.A. 22-30). On these occasions the officer observed unidentified men and women approach the appellant in the 1300 block of Ninth Street N.W., hand him pieces of paper which he would tear up after making his own notation on a paper returned to his shirt pocket; bills (currency) would be handed him and placed on a roll taken from his pocket. These were separate encounters. The officer observed 7 such occurrences in 45 minutes from noon onwards on September 26, 1957 (J.A. 23). When appellant came out on the street again that day appellant observed an additional 19 transactions take place with appellant in front of his house at 1310 9th Street N.W. (J.A. 24). On Sept. 28, 1950, from noon to 12:50, the officer observed 44 persons contact appellant under circumstances following the pattern described above (J.A. 27). Similar observations were made on September 30 (J.A. 30).

Officer Carter also witnessed a meeting on Sept. 26 between appellant and Officer Bigelow (who made the number plays in the instant indictment). In addition Officer Carter testified that on Sept. 26 he saw appellant leave the delicatessen near his home at 12:52 P.M., with bulging pockets; appellant then walked to 1310 9th Street N.W., unlocking the basement door and entering. Appellant returned and stood outside in about 10 minutes, minus the bulge (J.A. 23-24). The officer also observed appellant and an unidentified man with bulging pockets go into appellant's home at 1310 9th St., N.W. The man left without the bulge in about 3 to 5 minutes. On September 28, between 12:50 and 1:50 P.M. appellant observed two automobiles stop in front of appellant's house (1310 9th St. N.W.) where appellant was handed something (J.A. 27-28). At 1:50 P.M. an unidentified man, brown paper bag in hand, entered the basement (1310 9th St. N.W.) with bulging pockets; at 1:50 an unidentified man entered with bulging pockets; a woman entered with bulging pocket book, remaining 3 to 5 minutes, and coming outside with appellant without the bulge (J.A. 29-30).

Officer Carter's testimony before the jury covered substantially

in and around appellant's home during September which, together with the testimony of number plays of Officer Bigelow⁵ with appellant during this period, amply provided a probable cause basis for issuance of a search warrant.

Officer Bigelow testified that, in an undercover capacity, on seven separate days between September 24 and October 1, 1957 he placed number bets with appellant⁶ (J.A. 14-18). On October 1, 1957 the officer gave the appellant in payment for numbers bets, two one-dollar bills, whose serial numbers had been recorded (J.A. 19; Gov. Ex. 1, R. 114).

Sergeant Foran arrested appellant⁷ on October 1, 1957 in the basement hallway at 1310 9th Street N.W. and thereupon executed a search under the other warrant so permitting (J.A. 41-42, 46-47). Corporal Kissner searched appellant, taking two pieces of paper containing many number plays from his clenched fist (J.A. 43, R. 146; Gov. Ex. 2, R. 148). The officer also took over four hundred dollars from appellant's person, commingled with which were the two marked dollar bills which had been provided Officer Bigelow (J.A. 43, R. 121; Gov. Ex. 1, R. 114). Elsewhere in the premises Sergeant Foran recovered over three thousand dollars in cash (J.A. 47).

In each case appellant took the stand and there were similarities of substance in both defenses. First and foremost was a complete denial that he had ever accepted

the same ground. Compare J.A. 36-41. To the above observations must be added the sales of numbers to Officer Bigelow during this period. In addition, the affidavit supplied the Commissioner recounted that on Sept. 26, 1957 Forrest McAbee, Jr., a known numbers man, was observed in front of 1310 9th St. N.W. at 2:20 P.M. Three unidentified men handed him something which he took to the basement, remaining but about two minutes (J.A. 4).

⁵ In argument below appellant in effect conceded there was sufficient evidence for an arrest warrant (J.A. 31).

⁶ In D.C. Cir. 14601. See note 2.

⁷ *Ibid.*

number play from Officer Samuel E. Carter in January, 1957 (R. 110, 106, D.C. Cir. 14617) or with Officer Bigelow on any of the seven separate occasions in the fall testified to by that officer (J.A. 60).

As to number slips seized in January, appellant had admitted ownership on the stand but claimed they were numbers he might play, even though he recognized he would not play as many numbers as were shown (R. 111, 120-23, D.C. Cir. 14617). As to the fall numbers⁸ appellant claimed that in the excitement others in the house had dropped the number slips and he had picked them up (J.A. 58-59). In similar vein, as to the January search of his person in the dry cleaning establishment, appellant had testified the marked dollar at his feet had not come from him (R. 109, D.C. Cir. 14617).

As to the large sum of money found in his house, appellant explained it was part of a loan, secured by mortgage, which he had received from his employer over a year before (J.A. 59-60). The employer, a Ninth Street real estate owner, testified that he paid appellant a salary of seventy-five dollars a week (J.A. 60). He stated he had given the appellant four thousand dollars, in cash, on a note originally unsecured (J.A. 62, R. 230, D.C. Cir. 14601).

STATUTES INVOLVED

31 Stat. 1330 (1901), as amended, 22 D.C. CODE § 1501 (1951):

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee

⁸ To the officers arresting in October, however, appellant had made the same explanation as in January, that the slips contained bets he planned to make (J.A. 50).

or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

52 Stat. 198 (1938), as amended, 22 D.C. CODE § 1502 (Supp. VI, 1958):

If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than \$1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

SUMMARY OF ARGUMENT

I.

Operating a lottery and sale of numbers are separate offenses. In any event concurrent sentences were imposed.

II.

Appellant's point, that the presumption of operating a lottery from the fact of possessing number slips was in-

tended by the Congress solely as a guide for judges, not juries, is novel and insubstantial. Further, appellant is precluded from reliance upon it as he did not raise it below.

III.

The search warrant for appellant's premises was issued on a more than ample showing of probable cause, including evidence of numerous sales to an undercover officer as well as many observations of activities in and around appellant's house indicating it was a numbers drop.

ARGUMENT

I

Operating A Lottery And Sales Of Numbers Constitute Separate Offenses.

As to appellant's first argument, characterized as his main contention and relating but to the first count of each indictment (Br. 14), appellant recognizes (Br. 21 n. 21) that he is confronted with the principle that concurrent sentences cure errors pertaining to but one count.⁹ Fed. R. Crim. P. 52(a); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Wanzer v. United States*, 93 U.S. App. D.C. 412, 208 F.2d 45 (D.C. Cir. 1953).

Appellant urges that under 22 D.C. Code § 1501 (1951) Congress has made but one "allowable unit of prosecution" (Br. 16). Assuming initially (but purely for argument) that the point has merit it avails appellant nothing for it would not entitle him to dismissal of a sale or operation count or to an election. The principle is applied in full recognition that an indictment may be drafted in several counts to meet exigencies of evidence. *United States v. Universal C.I.T. Corp.*, 344 U.S. 218, 225 (1952). Such a course was warranted here, where appellant denied all sales and where the jury, in its verdict on counts all of

⁹ For penalties imposed see notes 1 and 2.

which were consistent,¹⁰ was selective. See notes 1 and 2.

The factor of sentence is not only important in the aspect of the *Hirabayshi* principle. The determinative question is what power of sentence did the Congress confer. The mode of submitting the case to a jury has no bearing. *Gore v. United States*, 26 U.S.L. Week 4532 (U.S. June 30, 1958).

Reaching the substance, the intent of the Congress to create several crimes was early recognized by this Court and amendments and additions since have but emphasized the continued intent of Congress to combat a large and pervasive evil in the manner of the class of cases recognized in *Gore*. In *Gore*, such crimes of narrow definition as the Mann Act, were sharply distinguished.¹¹ The plain words of Section 1501 indicate that punishment shall be imposed for "each said offense".

"Section 863 is very comprehensive in its language, and was evidently devised for the prevention of the policy-lottery mischief in all of its ordinary forms in the District of Columbia. In the execution of this intention *it creates several distinct offenses* that may be committed in the maintenance, promotion, prosecution, and exploitation of such schemes. . ."

Knoll v. United States, 26 App. D.C. 457, 459 (D.C. Cir. 1906) (emphasis supplied).

II

Juries May Be Informed of the Existence of Statutory Presumptions

Appellant's second argument (Arg. 2(a), Br. 23-26) is that the presumption of operating a lottery permitted by the statute to arise from possession of number slips (22 D.C. Code § 1501) "pronounces a rule of law solely for the

¹⁰ *Cook v. United States*, 90 U.S. App. D.C. 90, 193 F.2d 373 (D.C. Cir. 1951).

¹¹ *Bell v. United States*, 349 U.S. 81 (1955).

guidance of the trial court in passing upon the sufficiency of the government's evidence; and should not be the subject of an instruction to the jury" (Br. 23).

Consideration of the issue is precluded by appellant's failure to comply with Federal Criminal Rule 30.¹² In one case (D.C. Cir. 14601) there was a discussion as to requested instructions both before and after the charge (R. 307, 325-329) and at the request of the defense the jury was additionally instructed (as to appellant's denial of possession). Nowhere does there appear any objection to the mentioning of the presumption. In the other case (D.C. Cir. 14617), there was objection to the manner of wording the presumption,¹³ but there was not, as on appeal, any absolute objection to its submission in any form.

The very novelty of appellant's present contention necessitated below strict compliance with the rule requiring that before the jury retires the trial judge must be informed distinctly of grounds of objection to a charge. As incidentally indicated before (note 13) knowledge of

¹² Fed. R. Crim. P. 30; *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (D.C. Cir. 1950); *James v. United States*, 89 U.S. App. D.C. 201, 191 F.2d 472 (D.C. Cir. 1951); *Obery v. United States*, 95 U.S. App. D.C. 28, 217 F.2d 860 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 923 (1955).

¹³ Appellant's argument 2(b), is restricted solely to the following language in the charge in D.C. Cir. 14617: "So if you should find that this defendant had in his possession numbers slips, that is sufficient upon which to base a finding that the defendant was guilty of the charge as set forth in Count 1, unless his possession of the slips is otherwise explained to your satisfaction" (Br. 27; J.A. 123-124). Although appellant cites *State v. Bryant*, 245 N.C. 645, 97 S.E.2d 264 (1957), he recognizes the language here was not identical with that found erroneous in the precedent (Br. 29.) Judge Keech did not instruct that the burden was on appellant to "overturn and contradict" the Government proof. The judge's reference to the burden of explanation was in the typical and unexceptionable mode characteristic of such charges. *Maynard v. United States*, 94 U.S. App. D.C. 347, 351, 215 F.2d 336 (D.C. Cir. 1954), *citing*, *Casey v. United States*, 276 U.S. 413 (1928).

As appellant received but a concurrent sentence on the count to which this objection solely applies (see note 1) no substantial right is involved for the reasons discussed in argument one.

the presumption has been imparted to juries as a matter of course. Whatever incidental value rebuttable presumptions may have to a trial judge, the jury, as the fact finding institution in criminal cases, is the reason for their recognition or creation.¹⁴ It is especially important that knowledge of such presumptions be given to a jury in a criminal case, for the statutory presumption is the creature of the sole body, the legislature, with power to define the crime to which it appertains.

III

The Search Warrant For Appellant's Premises Was Issued On Probable Cause

Appellant's third argument (Br. 32) is that the search warrant in the case involving the search of appellant's house (D.C. Cir. No. 14601; see note 2) was improvidently issued because "the facts contained in the affidavit, on which it was predicated, did not establish adequate probable cause to believe that the things sought to be seized were in the premises directed to be searched." The specific objection is made that there is no allegation "that either of the officers had been inside the premises or had seen therein the items and objects described in the search warrant" (Br. 32). "Positive" knowledge is required only for the issuance of an all-hour warrant, not a daytime warrant. Fed. R. Crim. P. 41(c). The circumstances set forth in note four of the counterstatement indicate a more than adequate showing of probable cause. *Wyche v. United States*, 90 U.S. App. D.C. 67, 193 F.2d 703 (D.C. Cir.

¹⁴ Appellant's argument on the point is an a priori one (J.A. 23-25). He cites cases (Br. 25-26) addressed to a supporting argument similar to his first argument with reference to "identity of offenses" (Br. 25). The cases deal with distinguishable situations, such as criminal attempts and omissions in the income tax field, the gaming table statute, and claimed double jeopardy in single transaction cases. E.g., *Berra v. United States*, 351 U.S. 134 (1956) (conviction of willful attempt by means of filing false income tax return upheld; not error not to submit lesser crime, though greater sentence imposed).

1951), *cert. denied*, 342 U.S. 943 (1952); *United States v. Bell*, 126 F.Supp. 612 (D.D.C. 1955), *aff'd sub nom. Woods v. United States*, 99 U.S. App. D.C. 351, 240 F.2d 37 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 941 (1957).

Appellant claims (Br. 33) he was prejudiced by the revelation that about three thousand dollars in cash was found in his house. It will be recalled that this was but cumulative to the fact that another sizeable sum, approximately five hundred dollars, with which marked money was commingled, was found in a search of appellant's person, appellant making no argument against informing the jury as to the latter.¹⁵ Appellant furnishes no case where mere reference to the existence of such a sum, under similar circumstances, was held inadmissible. Further the affidavit upon which the warrant was issued abounds with observations of sums of money, some of them large. See note 4; J.A. 2-7.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

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Assistant United States Attorneys.

¹⁵ See note 5.

